

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Procedures to Identify and Resolve Location	)	WC Docket No. 10-90
Discrepancies in Eligible Census Blocks	)	
Within Winning Bid Areas	)	

To: Chief, Wireline Competition Bureau

**COMMENTS OF  
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

October 29, 2018

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## Summary

Developing a fair process for resolving discrepancies in “locations” eligible for Connect America Fund (“CAF”) Phase II funding is an important objective that is necessary to ensure that funding is appropriately applied and reduced where the preponderance of the evidence shows the grounds for support reduction. The Wireless Internet Service Providers Association (“WISPA”) supports the efforts of the Wireline Competition Bureau (“Bureau”) to invite public comment at this time, and encourages expeditious resolution of this proceeding so CAF auction winners can develop methodologies to research actual locations and, as necessary, modify build-out plans and budgets.

The Bureau should adopt its proposed framework with the few important modifications and refinements described in WISPA’s Comments. Taken together, these proposals will help establish the “rules of the road” for participants, stakeholders and the Bureau, thereby ensuring the quality of the locations evidence and creating greater certainty.

First, participants should have flexibility in the methodologies they use to determine locations. A “one-size-fits-all” approach is not conducive to deriving actual locations because different methodologies may be more accurate than others in different environments, or different data may be available for participants and stakeholders to access. Participants should, of course, explain their methodologies such that their evidence can be fairly evaluated by stakeholders and Bureau staff. Participants should have the option, but not the obligation, to consider future developments.

Second, the Bureau should make clear that any stakeholders challenging a participant’s evidence must certify that they are located in the subject geographic area and must present

contrary methodologies and evidence – it should not be sufficient for a stakeholder to simply allege defects in the participant’s methodology and evidence.

Third, the Bureau should shorten the timeframe for stakeholders to file challenges and lengthen the timeframe for participants to respond to stakeholders’ claims, which could be numerous. The Bureau also should have a 90-day period to resolve contested matters, with participants and stakeholders having an opportunity to privately resolve the dispute during the first 60 days of this period.

Fourth, audits should be conducted where the CAF recipient has defaulted on its deployment obligations or has misreported its served locations by more than a reasonable amount. USAC should also conduct a final audit at the time it is asked to certify that the recipient has met its six-year build-out milestone.

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The Wireless Internet Service Providers Association (“WISPA”), pursuant to Sections 1.415 and 1.419 of the Commission’s Rules, hereby comments on the *Public Notice* released by the Wireline Competition Bureau (“Bureau”) regarding procedures to identify and resolve discrepancies in “locations” eligible for Connect America Fund (“CAF”) Phase II support.<sup>1</sup>

WISPA supports the Bureau’s efforts to obtain greater accuracy in determining the locations eligible for CAF Phase II support. In addition to evidence in the record that the Bureau may, in some cases, have overestimated the number of locations when it adopted rules and procedures for the CAF Phase II reverse auction,<sup>2</sup> a few of WISPA’s members have first-hand experience with the challenge of identifying and reporting location information. WISPA members also were successful (and unsuccessful) bidders in the CAF Phase II reverse auction. These experiences inform WISPA’s comments and demonstrate its strong interest in ensuring

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<sup>1</sup> See *Public Notice*, “Wireline Competition Bureau Seeks Comment on Procedures to Identify and Resolve Location Discrepancies in Eligible Census Blocks Within Winning Bid Areas,” WC Docket No. 10-90, DA 18-929 (rel. Sept. 10, 2018) (“*Public Notice*”). The *Public Notice* was published in the Federal Register on September 28, 2018. See 83 Fed. Reg. 49040 (Sept. 28, 2018).

<sup>2</sup> See *id.* at 3-4.

that discrepancies are presented, challenged, and resolved in a fair, reasonable, and timely manner.

In general, WISPA agrees with the framework proposed in the *Public Notice*, and recommends guidance and refinements that would improve the reconciliation process and reduce burdens on both the Bureau and parties to a “locations” proceeding. First, participants should have flexibility in the way they identify whether a structure is an actual “location,” so long as the methodology is reasonable and explained. There should be no “one-size-fits-all” methodology that could limit some participants, especially smaller providers, by requiring an inordinate expenditure of resources to determine and verify. Second, WISPA proposes a streamlined adjudicatory process with the opportunity for opposing parties to resolve their differences before the Bureau renders its decision. Third, WISPA proposes specific circumstances when an audit would be required. With these refinements, the Bureau can provide more clarity to participants and stakeholders that will create a better record for Bureau decision-making, while protecting the integrity of the process and the CAF program.

## **Discussion**

### **A. Participant’s Evidence**

#### ***Definition of Actual Location***

The Bureau seeks comment on how it should define an “actual location” as part of the reconciliation process.<sup>3</sup> WISPA agrees with the Bureau’s explanation, based on previous decisions, that a “location” should possess the following characteristics:

- Residential housing unit or small business, but not an enterprise location; and
- The structure need not be occupied, but cannot be abandoned, derelict, condemned, or otherwise uninhabitable, or be an unfinished residential or business location or a future real estate development.<sup>4</sup>

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<sup>3</sup> *Id.* at 4.

The Commission asks whether “actual locations should include prospective developments that have a reasonable certainty of coming into existence within the support term.”<sup>5</sup> WISPA believes that a participant, if it so chooses, may include such future developments in the definition of “location” to the extent it can provide specific information that would show that specific locations are more likely than not to be constructed and inhabited within the six-year build-out period. Adopting a strict standard requiring such locations to be included would, in some cases, be difficult to obtain and/or be inconsequential if the result is an increase in the actual “locations” above the amount estimated by the Commission. While information concerning new developments may be available in development plans,<sup>6</sup> those plans may be confidential, and even if not, there can be no guarantee that the information will stay constant past the one-year period for determining “locations.” Over time, those future developments may be shelved or modified to either increase or decrease the number of housing units or small businesses such that applying a predictive judgment many years in the future is necessarily imprecise. By the same token, a participant that can satisfy the standard proposed above should not be precluded from doing so, and stakeholders will have the opportunity to raise concerns about the validity of the projected increase in the number of locations. The Bureau should not, however, look beyond the six-year build-out deadline to consider developments projected to become constructed and inhabited after that time frame.

### ***Reliability and Validity of Data***

WISPA agrees that participants demonstrating “the completeness, reliability, and validity of the actual location data” should describe “in narrative form . . . the methodologies used to

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<sup>4</sup> See *id.* at 5. These examples also should include campgrounds and other locations that lack commercial power.

<sup>5</sup> *Id.*

<sup>6</sup> See *id.*

identify structures within their eligible areas and distinguishing actual locations from other kinds of structures.”<sup>7</sup> Without any explanation of the methodologies used to determine a revised number of locations, potential stakeholders and the Bureau cannot determine whether the reduced, or increased, number of locations was determined by a set of reasonable parameters, and stakeholders and the Commission cannot assess the relative accuracy of the participant’s number.

However, WISPA does not believe that participants should be required to use any specific methodology. Just as USAC has published three sets of geolocation guidelines, with “variable levels of accuracy,”<sup>8</sup> so, too, should the Bureau recognize that there are other methodologies that recipients can use, some that generally may be more accurate than others, and some that work better in some environments than others. It should be plain from the participant’s narrative explanation how rigorous and exacting a particular methodology is, and the Bureau can take this into account when it reviews the record. Even if no stakeholder challenges the participant’s showing, the Bureau should have the discretion to prefer its count over the participant’s if it believes that its estimate is predicated on a better methodology. In cases where a stakeholder contests the participant’s showing, the Bureau can determine which of the estimates is best based on its proposed preponderance of the evidence standard.

While a particular methodology should not be mandated, some methodologies may be more determinative than others. As the Bureau correctly observes, “the potential shortcomings of geolocation methods may be minimized through specific practices.”<sup>9</sup> For example, desktop geolocation using web-based maps and imagery may be a good starting point, but that methodology, standing alone, leaves open the question of, once identified, which structures

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.*



should be deemed “locations.” In other words, this methodology cannot determine whether a particular structure is capable of being a residence or a small business, or whether it may be abandoned or uninhabitable. To alleviate this inherent deficiency, recipients should be permitted to apply reasonable qualitative criteria to determine whether a particular structure is a “location,” such as a minimum size of roof coverage, the number of levels in the structure (if viewable through imagery), and visual evidence. For example, a participant may incorporate into its methodology that a roof size of, say, 750 square feet or less is likely too small to house a residence or small business. Visual evidence, provided by either the recipient or a stakeholder, may either dispute or validate the methodology’s outcome on a location-by-location basis.

Moreover, some methodologies may be more effective in some areas than in others. Web-based aerial imagery should be more accurate in rural areas without tree cover that may wholly or partially obscure some buildings. The Bureau should not automatically reject a methodology that relies on web-based imagery in tree-covered areas, but should take that inherent deficiency into account when making a final determination in the number of actual locations. In cases where rooftops are obscured, the recipient may choose to employ other methodologies to provide the Bureau with a higher degree of proof.

In some areas, other sources of location data may be available. For example, some states allow public access to E911 location records. Use of such information may, however, be subject to interpretation because a “location” in an E911 database may not be the same as a “location” for CAF purposes. Or, in some areas property tax assessment data may be publicly available. These sources should be available, but not mandated, as evidence of whether a particular structure is a “location.”

Enabling participants and stakeholders to have the flexibility to develop location identification methodologies also will minimize burdens on small entities.<sup>10</sup> Requiring small providers or stakeholders to purchase software or send teams of employees to knock on rural farmhouse doors may, in many cases, be cost-prohibitive, extremely time-consuming and, in general, disproportionate to the intended benefits.

## **B. Relevant Stakeholders' Evidence**

The Bureau asks who should be “relevant stakeholders [that] would have the opportunity to review and comment on the information” submitted by the participant.<sup>11</sup> WISPA agrees that state and local authorities and Tribal governments, as well as individuals and potential customers, *in the relevant supported area*<sup>12</sup> should have the right to submit evidence, so long as the government or authority makes available to the participant, upon its participant, any information it has that might bear on the outcome. For example, a state with E911 or tax assessment data should not be permitted to deny a participant’s request to access that data (assuming it is not publicly available) and then use that same information to challenge the participant’s evidence.

WISPA believes that individuals and potential customers should, at a minimum, be required to provide a narrative description of the methodology they used and to certify under penalty of perjury that (1) their location data is true and accurate,<sup>13</sup> (2) the individual is located in the relevant geographic area, and (3) the stakeholder is not associated in any way with a competitor. Just as with the submission from recipients, the certification should be mandatory and must be signed by a person with relevant knowledge certifying that the stakeholder has

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<sup>10</sup> *See id.* at 11.

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

<sup>12</sup> For example, the State of Montana should not be permitted to comment on a participant’s “location” evidence for census blocks in Massachusetts.

<sup>13</sup> *See id.* at 8 (proposing same standard for participants).

engaged in due diligence to verify statements and evidence presented and that such information is accurate to the best of the certifying party's knowledge and belief.<sup>14</sup>

WISPA agrees that the evidence submitted by stakeholders should be the same as is required to be submitted by participants.<sup>15</sup> It should not be sufficient for a stakeholder to solely allege deficiencies in the participant's methodology; rather, a stakeholder also should provide a narrative description of the methodology it used and why that methodology should be preferred over both the Commission's estimate and the participant's showing. WISPA also agrees that the Bureau should dismiss information "that lacks some evidentiary showing" and to prefer evidence submitted by the recipient over "data sources that the stakeholder cannot conclusively demonstrate to be significantly more accurate than a recipient's data sources."<sup>16</sup> These evidentiary criteria will create the appropriate balance by ensuring that all parties to a reconciliation proceeding apply rigor to their analyses and do not waste the Bureau's scarce administrative resources.

### **C. Submission of Evidence**

#### ***HUBB Reporting of Location Evidence***

For the reasons stated in the *Public Notice*, the Bureau should require participants to report evidence of actual locations in the HUBB.<sup>17</sup> In addition to the tabular format the Bureau recommends, HUBB reporting should include a web-based feature that permits the participant to submit the descriptive narrative of its methodology.

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<sup>14</sup> *See id.*

<sup>15</sup> *See id.* at 6.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *See id.* at 7-8.

#### **D. Certifications and Deadlines for the Submission of Evidence**

WISPA agrees that the Bureau should establish a single filing window for participants to file location evidence, but asks that the filing window be open for 30 days rather than the proposed 14 days.<sup>18</sup> Although the filing deadline is already known – one year from August 28, 2018 – the Bureau may wish to announce additional filing or procedural requirements in the Public Notice announcing the filing deadline. Recipients would benefit from having additional time to set up accounts in the HUBB, obtain passwords, format their information and take other required procedural steps. WISPA also agrees that establishing a single filing window and common deadlines for stakeholder challenges and replies will permit the Bureau to review the evidence in all proceedings simultaneously, leading to more consistent decision-making.<sup>19</sup>

As discussed above with respect to stakeholders, WISPA agrees that the same certification requirements should apply to participants seeking to contest the Commission's location number.<sup>20</sup>

To adjudicate locations discrepancies, WISPA agrees that the Bureau should make an initial determination within 60 days of the filing deadline of those submissions that make *prima facie* cases for adjustment.<sup>21</sup> The Bureau should make clear, however, that any cases dismissed without an opportunity for stakeholder response should be limited to those where the participant failed to include the required certification or failed to explain its methodology. The Bureau should not, at this stage, dismiss a participant's showing for a lack of evidence, but rather should make the evidence available for stakeholder challenge. WISPA recommends that stakeholders

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<sup>18</sup> *See id.* at 8.

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See id.*

have 60 days, not 90 days as proposed, to submit their rebuttal evidence,<sup>22</sup> and that participants then have 30 days to file a reply. It should not take stakeholders 90 days to submit alternative evidence when they, like participants, know well in advance the type of evidence that will be required and the deadline for filing. In fact, stakeholders can develop their methodology and evidence independently even before the participant makes its filing. A 30-day period for filing a response will provide sufficient time for small business participants to carefully review and assess the rebuttal and, in some cases, respond to multiple challenges, a situation more likely to arise if individuals are deemed “relevant stakeholders” permitted to object or if the participant is challenged in more than one area or census block. Taken to a logical extreme, it would be daunting, if not impossible, for a participant, especially a small provider, to respond in 15 days to contrary methodologies and evidence filed by different parties for a large number of its supported census blocks.

#### **E. Adjudication of Challenges**

WISPA agrees with the Bureau’s proposals to require participants to bear the burden of persuasion and to resolve cases based on a preponderance of the evidence standard.<sup>23</sup> The Bureau relied on identical standards in resolving challenges on whether census blocks were “served” or “unserved” for purposes of identifying census blocks available for CAF Phase II reverse auction support, a process that generally worked well and with which the Bureau has familiarity. As discussed above, the Bureau should make clear that any stakeholder challenging the methodology used by a participant seeking a “location” adjustment must present an alternative methodology or demonstrate why Bureau’s estimate is more accurate. In other words, solely alleging defects in a participant’s methodology should be an insufficient basis for

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<sup>22</sup> *See id.*

<sup>23</sup> *See id.* at 8-9.

dismissing the participant's showing because the stakeholder has not shown that there is a better methodology that results in a more accurate location count.

WISPA asks the Bureau to resolve all contested cases within 90 days of the deadline for a participant to file its reply to stakeholders' evidence. There are at least two reasons for this.

First, it is critical that CAF recipients know as soon as possible if any adjustment will be made to their support amount so that they can, as necessary, adjust build-out schedules and budgets and obtain revised letters of credit. Second, the Bureau should, within the first 60 days of this specified period, allow participants and stakeholders to privately negotiate a solution.

Participants and stakeholders will have the opportunity to assess each other's evidentiary showings and methodologies and achieve a negotiated result that would not be as one-sided – one way or the other – than the alternatives presented to the Bureau. One of the benefits of a “baseball-style” process where the Bureau has only the known choices presented in the record is the opportunity and incentive for the opposing parties to find middle ground and avoid the consequences of a binary result. The parties reaching a settlement would report the terms of the agreement and the agreed-on locations to the Bureau, which would then make any appropriate support adjustment based on that agreement. In light of the location ceiling established by the Commission, the certification requirements applicable to both participants and stakeholders, the need for parties to explain their methodologies, and the time and expense involved in obtaining revised letters of credit, WISPA does not believe that the opportunity to settle contested cases will lead to exaggerated participant and stakeholder claims, but will rather encourage parties to present solid, diligent, and defensible evidence.

## **F. Confidentiality of Evidence**

In light of the privacy concerns raised in the *Public Notice*,<sup>24</sup> WISPA recommends that the Bureau adopt a protective order to control access and use of the participant's evidence. This will avoid the need for every participant to file cookie-cutter requests for confidential treatment while allowing stakeholders to access the information for purposes limited to filing an alternative methodology and evidence. A protective order also should include enforcement consequences for any party that violates its terms and uses the participant's information to gain a competitive benefit they would not otherwise have.

## **G. Audit Process**

Once any locations discrepancies are settled or resolved, the Commission, through USAC, should exercise its audit authority in cases where the participant (1) has defaulted on its deployment obligations, or (2) misreports served locations by more than 30 percent in any one year or by more than 15 percent in two consecutive years.<sup>25</sup> WISPA believes these metrics to be reasonable triggers for an audit – one looks to an anomaly occurring once, and the other looks to lesser anomalies occurring over time. WISPA does not believe that an audit of all participants will be necessary in the absence of any identifiable concerns,<sup>26</sup> and will further impose burdens on those CAF recipients, especially smaller providers, that should be spending their resources building broadband networks. However, WISPA does not agree with the suggestion that an audit should be triggered if the number of served locations within the supported area reported at the end of the support term is significantly higher than the actual locations list.<sup>27</sup> Because

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<sup>24</sup> *See id.* at 9.

<sup>25</sup> *See id.* at 10.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

deployment to a *larger* number of locations does not affect the amount of support, USAC should not expend its scarce resources to conduct audits that do not lead to any possible enforcement.

In connection with USAC's final certification that a CAF recipient has met its six-year deployment obligation, USAC should have the right to conduct a final audit to determine whether the number of locations determined through the reconciliation process is accurate. Given the rigor involved in the process, this should not be an opportunity to second-guess the decisions made by the Bureau or introduce new methodologies or evidence. Recipients will be making annual certifications under penalty of perjury and any potential problems should be identified through audits triggered by defaults and misreporting, as described above. Finally, auditing at the end of the support term – long after the end of the build-out term – cannot have any bearing on the number of locations certified by USAC at (or before) the six-year build-out milestone. There can be significant changes from new developments over time, including during years seven through 10 when the build-out period has concluded.

### **Conclusion**

The *Public Notice* generally proposes a process that should be fair and reasonable with an appropriate degree of rigor and oversight. WISPA's proposed refinements should be adopted to enable greater flexibility and to reduce administrative burdens and burdens on small business



CAF recipients without harming the integrity of the “locations” reconciliation process specifically or the CAF program generally.

Respectfully submitted,

**WIRELESS INTERNET SERVICE  
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