

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rural Digital Opportunity Fund)	WC Docket No. 19-126

**VERMONT DEPARTMENT OF PUBLIC SERVICE
PETITION FOR RECONSIDERATION AND CLARIFICATION**

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SUMMARY

VTDPS shares the Commission's goal of bridging the digital divide. Many of the rules adopted in the Order are aimed to ensure that finite federal dollars will go toward bringing broadband service to wholly unserved areas. VTDPS supports a framework for Phase I of RDOF that is appropriately balanced between ensuring that areas are served and ensuring that they are not overbuilt using limited universal service dollars. VTDPS therefore seeks reconsideration and clarification of certain aspects of the Order.

Exclusion of Census Blocks Receiving State Broadband Subsidies is Misaligned.

The Commission should reconsider its decision to exclude from Phase I census blocks that receive state broadband subsidies for two independent reasons. First, the Commission failed to provide adequate notice of such census blocks as required under the APA. Second, the approach adopted does not fully consider the benefits of and preference toward federal-state partnerships that could ensure the efficient use of federal broadband dollars and provide the Commission with detailed location-based data it currently lacks. In the alternative, because market forces and competitive bidding models continue to fail in bridging the digital divide, the Commission should use its Section 254 authority to partner with states and create a grant program to implement and fulfill the objectives of the universal service fund.

How Certain Census Blocks will be Excluded from Phase I Requires Clarification.

The Commission should clarify how census blocks that receive alternate funding will be determined and excluded from RDOF. First, for census blocks that have service funded by state broadband subsidies, the Commission should clarify that it will partner with states to determine E911 locations that remain unserved. Second, for census blocks that receive USDA ReConnect awards, the Commission should clarify when and how they will be excluded from Phase I of RDOF. Finally, the Commission should clarify whether census blocks excluded from Phase I due to receiving state subsidies or ReConnect funding will also be excluded from Phase II.

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Pursuant to Section 1.429 of the rules of the Federal Communications Commission (“Commission”), the Vermont Department of Public Service (“VTDPS”)¹ respectfully petitions the Commission to reconsider its recent order regarding Rural Digital Opportunity Fund eligible areas (“Order”).² The Order excludes from Phase I those census blocks that have been identified as having been awarded funding through state broadband subsidy programs to provide 25/3 or better service.³

VTDPS seeks reconsideration of the Order’s exclusion of census blocks awarded funding through state broadband programs for Phase I of RDOF. The Order did not provide adequate notice of the rules consistent with the Administrative Procedures Act (“APA”) and did not fully consider the benefits of collaborative federal-state partnerships that could materially assist the Commission in achieving its universal service goals. In addition to seeking reconsideration, VTDPS seeks clarification on how the Commission plans to gather information to determine

¹ VTDPS is an executive branch agency charged with representing the public interest in energy, telecommunications and water utility matters. 47 C.F.R. § 1.429(a) permits “any interested person” to petition for the reconsideration of a final action. VTDPS is an interested person because the Order will have a direct impact on broadband access in the State of Vermont, the interest of which VTDPS represents. Although VTDPS was not actively involved in this rulemaking during the notice and comment period, such action is not a condition precedent of the rule. This petition is also timely under 47 C.F.R. §§ 1.429(d) and 1.4(b)(1).

² *Rural Digital Opportunity Fund; Connect America Fund*, Final Rule, 83 Fed. Reg. 13773 (Mar. 10, 2020) (“*RDOF Order*”).

³ *RDOF Order* at 13774.

those census blocks with service as a result of (1) United States Department of Agriculture (“USDA”) ReConnect Program funding or (2) state broadband funding. VTDPs also seeks clarification on how the Commission will coordinate with the USDA regarding the timing of the Phase I auction and grant of ReConnect awards. Finally, VTDPs seeks clarification on whether these types of census blocks will be excluded from Phase I of the auction or both Phase I and Phase II.

I. STATE BROADBAND INITIATIVES

VTDPs has a Division for Telecommunications and Connectivity (“Division”), the mission of which is to promote and expand broadband access to underserved and unserved locations in Vermont. The Division has two programs directed at bringing broadband to the most remote areas of the state. The first is granting of broadband development awards through the state’s Connectivity Initiative, which is funded through Vermont’s Universal Service Fund (“VUSF”).⁴ Connectivity Initiative grants are awarded to providers that agree to extend service to those areas of the state least likely to be served through the private sector or through federal programs.⁵ Any local or private funding obtained by communities in collaboration with providers for broadband development will be matched with Connectivity Initiative funding.⁶

In order to receive Connectivity Initiative funding, a broadband provider must commit to provide 25/3 Mbps in underserved areas. The program includes an aggressive buildout schedule that requires a network to be completed within one year of receiving funding. This ensures that providers quickly use state funding to deploy broadband facilities to those communities most in need. Since its inception in 2015, the Connectivity Initiative has expanded to include community

⁴ 30 V.S.A. § 7515b.

⁵ *Id.*

⁶ See Vermont Department of Public Service Internet and Mobile Wireless, available at <https://publicservice.vermont.gov/connectivity> (last visited April 2, 2020).

development projects. In the past five years, Vermont has awarded approximately \$2.1 million in Connectivity Initiative grants to providers.⁷

The second broadband program in Vermont is the Broadband Innovation Grant (“BIG”) program, created in 2019. The Vermont Legislature allocated \$700,000 from the state’s General Fund to the VUSF to fund grants issued through the BIG program. Up to \$60,000 in BIG grant funds can be used to fund feasibility studies related to the deployment of broadband in rural unserved and underserved areas of Vermont. Eligible applicants include communications union districts⁸ and other units of government, nonprofit organizations, cooperatives, and for-profit businesses. To date, VTDPs has issued three BIG grants and is on track to issue eight more in the Spring of 2020, with the expectation that awardees will subsequently apply for Connectivity Initiative funding.

Accordingly, the VTDPs has a strong and continuing interest in ensuring its ability to fund rural broadband at the state level without thereby effectively foreclosing itself from participating in federal connectivity funding programs.

II. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO EXCLUDE CENSUS BLOCKS AWARDED FUNDING THROUGH STATE BROADBAND PROGRAMS

VTDPs asserts that the Commission should reconsider its decision to exclude census blocks awarded funding through state broadband programs for two reasons. First, the Commission did not provide adequate notice regarding the exclusion of such census blocks in violation of the APA. Second, the approach adopted in the Order does not fully consider the

⁷ Vermont Department of Public Service Annual Connectivity Report, available at <https://legislature.vermont.gov/assets/Legislative-Reports/2019-Annual-Report-2020ee-FINAL-with-Cover-Letter-and-appendices.pdf>, at 3 (Jan. 15, 2020) (“*Connectivity Report*”).

⁸ Otherwise known as “CUDs”, communications union districts are comprised of two or more towns and cities that form for the purpose of delivering municipal communications services and operating their own communications plant. See 30 V.S.A. § 3051.

benefits of collaborative federal-state partnerships that could (1) provide for the efficient use of federal broadband dollars; and (2) provide the Commission with the detailed location-based data it currently lacks. In the alternative, because market forces and competitive bidding models continue to fail in bridging the digital divide, the Commission should use its Section 254 authority to partner with states and create a grant program to implement and fulfill the objectives of the universal service fund.

A. The Commission’s Decision to Exclude Census Blocks Awarded State Broadband Subsidies Runs Afoul of the Administrative Procedure Act

The Commission did not provide adequate notice pursuant to Section 553 of the APA that it was considering excluding from RDOF those census blocks awarded funding through alternative federal or state broadband subsidy programs in addition to those blocks awarded ReConnect Program funding.⁹ The APA provides that the Commission may promulgate new rules that “create new law, rights, or duties,”¹⁰ but only after following the notice-and-comment procedures set forth in Section 553.¹¹ No comment was ever sought regarding the exclusion of census blocks that receive funds from similar federal or state subsidy programs and therefore no meaningful opportunity was given for affected parties to participate. The Order provides no

⁹ 5 U.S.C. § 553.

¹⁰ *Fertilizer Institute v. E.P.A.*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991).

¹¹ *See* 5 U.S.C. § 553 (providing for general notice of proposed rulemaking to be published in the Federal Register, along with the opportunity for interested parties to participate in the rulemaking through the submission of comments). *See also Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199, 1203 (2015) (“An agency must consider and respond to significant comments received during the period for public comment”) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)); *California v. Health and Human Services*, 281 F.Supp.3d 806, 825 (N.D. Cal. 2017) (following an agency’s rulemaking notice, 5 U.S.C. § 553(b-c) requires “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” “The agency must then consider any “relevant matter presented...”).

explanation or justification for the exclusionary criteria¹² and is therefore unlawful.¹³

The Order explained that exclusion from RDOF of census blocks awarded similar federal or state funding “is consistent with [the Commission’s] overarching goal of ensuring that finite universal service support is awarded in an efficient and cost-effective manner and does not go toward overbuilding areas that already have service.”¹⁴ This statement was included in the draft Order, but does not constitute sufficient notice alerting all affected states that they could potentially be excluded from RDOF based on their own broadband initiatives.¹⁵ In fact, the only state mentioned as being potentially excluded based on its state-based broadband initiative during the rulemaking process was New York.¹⁶

Even if this was sufficient notice, the Order and preceding Notice of Proposed Rulemaking (“NPRM”) did not provide notice of this new rule as a matter of fact. An NPRM must include either the terms or substance of the proposed rule or a description of the subjects and issues involved. It must provide sufficient detail on its content and basis in law and evidence to allow for meaningful notice and comment.¹⁷ Nothing in the NPRM or the draft Order indicated that the Commission was considering excluding or reducing the eligibility of nearly 30 states to participate in RDOF. At no point during the rulemaking process did the Commission

¹² See *Citizens Telecommunications Co. of Minn. v. F.C.C.*, 901 F.3d 991, 1001, 1005 (8th Cir. 2018) (stating that the agency’s notice must be “sufficiently descriptive of the ‘subjects and issues involved’ so that interested parties may offer informed criticism and comments,” quoting *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1319 (8th Cir. 1981) (internal quotation omitted)); accord. *Missouri Limestone Producers Ass’n, Inc. v. Browner*, 165 F.3d 619, 622 (8th Cir. 1999), *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976).

¹³ The Order also goes against longstanding Commission policy to work with states to meet universal service goals and could potentially be interpreted as a clear error in judgment consistent with the “arbitrary and capricious” standard. See 5 U.S.C. § 706(2)(A). See also *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (A reviewing court must consider whether an agency’s decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment).

¹⁴ *RDOF Order* at 13774.

¹⁵ *National Ass’n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982) (notice and comment requirements triggered where new agency rules impose significant changes on affected parties).

¹⁶ *Rural Digital Opportunity Fund; Connect America Fund*, Declaratory Ruling and Notice of Proposed Rule Making, 34 FCC Rcd 6778, 6795, ¶ 48 n.91 (2019).

¹⁷ See *American Med. Ass’n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

give any indication that it was contemplating such a substantive change as excluding from RDOF census blocks that receive funding from similar state programs, nor did the Commission give any indication that it would entertain comments on the matter. Indeed, neither the NPRM nor the Order contained any indication that census blocks awarded funding through similar federal or state broadband programs would be excluded from RDOF. This was not a “logical outgrowth” of the rules as they were proposed in the draft Order and the Commission therefore did not adequately frame the subject for discussion.¹⁸ Further, the exclusion of census blocks awarded state broadband funding is a change “so major” that it requires re-notice to allow interested parties a fair opportunity to comment.¹⁹ On reconsideration, the Commission should allow for comment from affected states and other parties on the issue of state subsidies and thereby address the inadequacy of its APA notice compliance.

B. The Commission Should Reconsider its Decision to Exclude Census Blocks Awarded State Broadband Subsidies and Partner with States to Obtain Location-Based Data

As a matter of policy, the Commission erred in deciding to exclude census blocks awarded funding through state broadband programs relative to where the deployment of broadband services can occur. In Vermont, 1,177 locations in 191 census blocks have received funding through the state’s Connectivity Initiative. These are areas that remain on the whole unserved and in the most need of broadband service. Should the Order stand and census blocks that have received state funding are excluded from Phase I, it will result in 191 Vermont census blocks receiving no RDOF funding.²⁰ Furthermore, in order to avoid contamination of census

¹⁸ *Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 533 (D.C. Cir. 1982) (Explaining that an agency does not need to renote changes that follow logically from the rules it originally proposed).

¹⁹ *Id.* (“An agency adopting final rules that differ from its proposed rules is required to renote when the changes are so major that the original notice did not adequately frame the subjects for discussion”).

²⁰ VTDPs agrees with the Commission on the importance of ensuring efficient and cost-effective awarding of finite universal service support in order to avoid duplicative buildout and reach unserved areas. However, to ensure that federal dollars are wisely spent, a more granular understanding of broadband needs is necessary. *See infra* Section

blocks that would otherwise be eligible for Phase I, for the year 2020, Vermont will be forced to delay awarding up to \$600,000 in state broadband funding for which there are timelines and buildout schedules in place. As explained herein, the state's need for federal broadband dollars is vital, and exclusion from Phase I for either of these reasons will effectively slow the dispersing of broadband dollars – state or federal – and result in less broadband buildout in the state overall. To that end, local providers have informed VTDPs that RDOF funding is essential to their potential plans to offer broadband in affected communities. It is therefore crucial that areas receiving state broadband funding be eligible for Phase I as well as Phase II.

VTDPs is required under state law to collect broadband availability and cost data in connection with state and federal broadband initiatives.²¹ Relying on carrier reporting information and Vermont's Connectivity Initiative grant data, VTDPs is able to obtain a detailed understanding of continuing broadband needs in the state. Currently, broadband service of at least 25/3 Mbps or better is unavailable for 80,800 out of 303,835 business and residential locations in the state. The cost to deploy networks that can provide broadband with speeds of the Commission's minimum 25/3 Mbps threshold is estimated to be approximately \$2,800 per site, equaling of \$230 million for 80,800 locations.²² Most of these locations are considered "underserved" by the Commission. However, approximately 20,978 locations are "wholly unserved" and estimated to cost approximately \$33.5 million to serve.²³

B.ii. Further, VTDPs acknowledges the Wireline Competition Bureau's March 17, 2020 release of preliminary list and map of eligible areas for Phase I (AU Docket No. 20-34). VTDPs is currently reviewing the list and map and plans to partake in the limited challenge process described in the Public Notice.

²¹ 30 V.S.A. § 202e(e).

²² VTDPs has estimated that by 2021, approximately 45,833 business and residential locations will receive 10/1 Mbps as a result of FairPoint Communications' (now Consolidated Communications) CAF-II expansion.

²³ See Vermont Department of Public Service, *Broadband High Speed Internet Availability in Vermont*, available at <https://publicservice.vermont.gov/content/broadband-availability> (last visited April 2, 2020). See also *Connectivity Report* at 9 (Estimating a cost of \$1,600 per site for unserved locations. The number of unserved locations in Vermont was recently updated from 16,899 to 20,978 via the Department's annual survey and mapping exercise).

VTDPS applauds the Commission for recognizing the need to help rural states like Vermont bridge the digital divide. With a population of 623,989 people, Vermont is the second-smallest state by population in the country.²⁴ In contrast to states with large populations from which to draw significant amounts of tax dollars to dedicate to broadband initiatives, Vermont estimates that it will only be able to award approximately \$600,000 in Connectivity Initiative and BIG grants in the year 2020.²⁵ It is therefore imperative that, in order to bring broadband to unserved areas, Vermont obtain federal assistance. Connecting those most in need will not happen by discouraging states, even small states like Vermont with limited resources, from seeking to participate in RDOF and receiving the federal dollars so desperately needed to deploy broadband. The Order as it is currently written does just that, and therefore runs counter to the public interest by precluding the type of federal-state partnership that Congress, the courts, and the Commission have long recognized as vital to promoting and advancing universal service goals.

i. The Commission Should Partner with States to Facilitate Efficient Broadband Investment

VTDPS urges the Commission to instead partner with states that have broadband initiatives in order to promote the efficient use of both federal and state broadband dollars and make universal service a reality. Congress has acknowledged the important role that states have in developing and accomplishing key universal service objectives.²⁶ The Communications Act of 1934, as amended (“Communications Act”) affords states important roles in universal service fund implementation, including the designation of carriers as eligible telecommunications

²⁴ See <https://www.census.gov/quickfacts/VT>.

²⁵ In light of the recent COVID-19 pandemic, VTDPS anticipates that these grant award amounts may decrease.

²⁶ See e.g., PUBLIC LAW 110–385, Section 1301(4) (“The Federal Government should also recognize and encourage complementary [s]tate efforts to improve the quality and usefulness of broadband data and should encourage and support the partnership of the public and private sectors in the continued growth of broadband services and information technology for the residents and businesses of the [n]ation”).

carriers, and permits them to create their own universal service funds.²⁷ Courts have recognized that the Communications Act “plainly contemplates a partnership between the federal and state governments to support universal service,” and that “it is appropriate—even necessary—for the [Commission] to rely on state action.”²⁸ The Commission itself has acknowledged the important role that states must have in advancing universal service and has undertaken a variety of efforts to achieve such a partnership.²⁹

Partnering with state broadband initiatives will maximize the efficient use of both state and federal dollars without limiting the ability of the state to engage in self-help to close the digital divide, all of which is in the public interest. States are in the best position to determine where broadband is needed most, and federal-state partnership would enable the Commission to leverage this position and the understanding states have of their own broadband needs and ultimately achieve the Commission’s most important policy initiative of bridging the digital divide. Further, ensuring that RDOF funding is awarded to states like Vermont that are providing their own funds is consistent with the Commission’s long-standing goal of encouraging state funding of broadband development. This would satisfy the Commission’s desire for more active state involvement “in spurring broadband connectivity” and advance additional funding to states with their own programs.³⁰

²⁷ See 47 U.S.C. § 214(e). See also 47 U.S.C. § 254(f).

²⁸ *10th Qwest Corp. v. F.C.C.*, 258 F.3d 1191, 1200, 1203 (10th Cir. 2001).

²⁹ See e.g., *Federal-State Joint Board on Universal Service*, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 18 FCC Rcd 22,559, 22,568 ¶ 17 (2003) (noting that “[t]he Act makes clear that preserving and advancing universal service is a shared federal and state responsibility”); *Connect America Fund; ETC Annual Reports and Certifications*, Order, 32 FCC Rcd 968, 976, ¶ 22 (2017) (“[T]he lessons learned from partnering with New York may help inform the Commission’s decisions for implementing the nationwide Connect America Phase II auction and also will provide an opportunity to set an example for how state and Commission partnerships could work in the future”) (emphasis added) (“*New York Waiver Order*”).

³⁰ See *In re: Modernizing the E-rate Program for Schools and Libraries; Connect America Fund*, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15,538, 15560, ¶ 56 (2014) (“To encourage state participation, beginning in funding year 2016, we will increase an applicant’s discount rate for special construction charges up to an additional 10 percent in order to match state funding the applicant receives on a one-dollar-to-one-dollar basis.”) (emphasis added).

Were the Order to instate federal-state partnership in lieu of competition, it would encourage co-investment and coordination and thereby more likely lead to bridging the digital divide. Federal-state partnership would simultaneously leverage a state's local knowledge of its own broadband needs and further important Commission policies of spurring broadband investment in the areas that need them. It would also encourage innovation for broadband deployment funding and, when more traditional methods do not achieve anticipated results, help develop new solutions to old problems around broadband investment.³¹ Finally, partnering with states that have their own broadband programs could help reduce some of the burden on federal programs like RDOF while ensuring continued broadband deployment in areas of the states that need it most.

ii. The Commission Should Consider Including Location-Based Broadband Availability Data in its Preliminary List of Eligible Areas for Phase I

As part of a federal-state partnership, the Commission should consider including in its methodology for determining eligible areas for Phase I of the RDOF auction the location-based broadband availability data gathered by states that qualifies areas as “wholly unserved.”³² This may or may not include census blocks where ReConnect funds or state broadband subsidies have been awarded. As mentioned previously, VTDPs tracks broadband availability data on an annual basis. It tracks this data by monitoring service at each E911 location in the state. This is more granular data than that available via Form 477 because it pinpoints the exact site that is served or unserved within the census block in which it is located.

Including E911 location information in the list of eligible census blocks is beneficial because it will lessen administrative and time-related burdens the Order cited as reasons for

³¹ See *infra* Section B.iii.

³² VTDPs recognizes that limited location data is included in the Commission's preliminary list of eligible areas released on March 17, 2020 (AU Docket No. 20-34).

declining to hold a robust challenge process.³³ In fact, including location-based data as part of the Phase I list of eligible census blocks has the potential to alleviate the Commission’s concerns around possible Phase I delays because the Commission will already have the information it needs to determine those census blocks deemed as “wholly unserved.” This will obviate the need for any post-auction reconciliation and alleviate concerns regarding the exclusion of census blocks where just one or two locations have 25/3 service. It will also assist the Commission in “prov[ing] the negative” because location data has optimal capability to show an area that is not served.³⁴ Finally, incorporating location data into the Phase I eligibility process will promote efficient use of federal dollars because it will assist the Commission in ensuring prevention of overbuilding.

iii. The Commission Should Consider as an Alternative Partnerships with States to Create a Grant Program that will Facilitate the Efficient use of Federal Funding and Further the Goals of Section 254

VTDPS recognizes the benefit of and the Commission’s strong preference for distributing federal dollars to carriers as a means of bridging the digital divide where market forces alone have been insufficient to bring broadband to those areas still in need.³⁵ However, just as market forces have failed to effectively bridge the digital divide, so has the competitive bidding model. Continued strict application of competitive bidding alone will continue to frustrate the Commission’s top priority. There is no certainty that with RDOF funding, broadband service will reach each location in each census block, and absent a new approach to an old problem, it is

³³ *RDOF Order* at 13774-13775.

³⁴ *Id.*

³⁵ See *Federal-State Joint Board on Universal Service*, Second Recommended Decision, 13 FCC Rcd 24744, 24767, ¶ 61 (1998) (Recommending against distribution of universal service funds directly to state commissions “in light of the long-standing practice at the time that the 1996 Act became law of distributing federal universal service support to the carriers providing the supported services, and the absence of any affirmative evidence in the statute or legislative history that Congress intended is a fundamental shift to a state block grant distribution mechanism”) (“*Joint Board Recommended Decision*”).

all but certain that the digital divide will continue to widen. The Commission should therefore consider as an alternative to RDOF partnerships with states to create a grant program.

Partnering with states in this manner will utilize the detailed understanding states have of their broadband needs and further congressional intent and the express terms of Section 254 of the Communications Act. Both the Commission and the courts have agreed that the extensive grant of authority provided to the Commission by Congress under Section 254 provides it with significant leeway to effect the broader purposes of the universal service fund.³⁶ This includes creation of grant programs in partnership with states to leverage funds in order to advance the deployment of broadband services and drive broadband investment.³⁷ Providing funds in partnership states would also align with the goals of the Commission's *2011 USF Transformation Order*, in which it determined that "nothing in Section 254 ... requires us simply to provide federal funds to carriers and hope that they will use such support to deploy broadband facilities."³⁸

III. THE COMMISSION SHOULD CLARIFY HOW CENSUS BLOCKS RECEIVING ALTERNATE FUNDING WILL BE DETERMINED AND EXCLUDED FROM RDOF

The rule adopted by the Commission excludes from Phase I "those census blocks which

³⁶ See e.g., *Federal State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8901, ¶ 591 (1997) ("The language of section 254(h)(2) grants the Commission broad authority to enhance access to advanced telecommunications and information services, constrained only by the concepts of competitive neutrality, technical feasibility, and economical reasonableness") (*Joint Board Report and Order*"); see also *Texas Office of Public Utility Counsel, et. al. v. F.C.C.*, 183 F.3d 393 (5th Cir. 1999) ("[W]e are convinced that Congress intended to allow the FCC broad authority to implement this section of the Act"); *Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 826 F.2d 1074, 1080 (D.C. Cir. 1987) (noting that a broadly worded statute provides an agency with "flexibility in carrying out its duties...") (citations omitted).

³⁷ VTDPs recognizes that this proposal could be interpreted as going against the legislative intent behind Section 254. See *Joint Board Second Recommended Decision*, ¶ 61. See also *Joint Board Report and Order*, ¶ 551 (agreeing with Joint Board that block grants are not consistent with the statutory intent of Section 254). However, the telecommunications landscape as it exists today is vastly different than it was over 20 years ago, and the Commission has recognized that it has discretion under the law, further supported by its recognition in the value of federal-state partnerships in promoting and advancing universal service goals, to address those differences with more nontraditional approaches. See generally *New York Waiver Order*. See also *supra* Section B.ii.

³⁸ See *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17686, ¶ 65 (2011), *aff'd sub nom.*, In re: FCC 11-161, 753 F.3d 1015 (10th Cir. 2014).

have been identified as having been awarded funding through the [USDA's] ReConnect Program, or awarded funding through other similar federal or state broadband subsidy programs to provide 25/3 Mbps or better service.”³⁹ The Order directs the Wireline Competition Bureau to “consult with the [USDA's] Rural Utilities Service prior to publication of the final eligible areas and exclude the portions of any census blocks from eligibility for the [RDOF] Phase I that are substantially overlapped by a ReConnect awardee as of a date certain.”⁴⁰ The limited guidance provided in the Order regarding how, when and where census blocks will be excluded opens the door to unequal application of the rules between providers and states, not to mention risk of litigation, and therefore should be clarified.

First, it remains unclear how information will be gathered to determine those census blocks that have service funded by state broadband subsidies. While VTDPs is opposed to excluding them from Phase I for the reasons stated herein, clarification is nevertheless necessary. Clarification on how census blocks receiving state broadband funding will be excluded will allow Vermont and states in similar situations to more quickly deploy their broadband funding in a way that is complimentary rather than counter to the Commission's efforts, and in turn will ensure that taxpayers receive the most benefit under both state and federal broadband programs. Further, the Commission should clarify that it will partner with states to determine E911 locations that remain unserved, which will assure that federal dollars are stretched as far as possible and overbuild does not occur.

Second, the Order does not specify when and how census blocks that receive USDA ReConnect awards will be excluded from Phase I. Despite closing the application window for first round ReConnect awards in July 2019, over eight months later, the USDA continues to

³⁹ *RDOF Order* at 13774.

⁴⁰ *Id.* at n. 31.

award funds to round one applicants.⁴¹ The same can likely be expected for the second round of awards, for which the application window will close on April 15, 2020. Because it is highly unlikely that all awardees of ReConnect funding will be in place prior to the October 22, 2020 Phase I auction start date, and given that ReConnect funds are awarded on a rolling basis, the Commission should clarify how it plans to reconcile and subsequently exclude census blocks receiving ReConnect funds from Phase I. The Commission should further clarify how it will address census blocks that could potentially receive ReConnect funding where a provider has applied for an award but has yet to be granted one prior to the October 22, 2020 Phase I start date.⁴²

Finally, the Order is ambiguous as to whether census blocks excluded from Phase I either due to state subsidies or ReConnect funding will also be excluded from Phase II.⁴³ In order to effectively bridge the digital divide and reach unserved locations in those census blocks not wholly served, the Commission should clarify that they will not be excluded from Phase II.

⁴¹ See <https://www.usda.gov/reconnect/program-overview>.

⁴² VTDPs shares the concerns expressed by Commissioner O’Rielly to RUS Administrator Chad Rupe regarding potentially wasteful spending of ReConnect funds, given that the revised 90 percent unserved threshold will likely result in providers upgrading service in lower cost areas that are not in need of broadband subsidies in lieu of using the funds to bring service to unserved areas. Letter from Cmr. Michael O’Rielly to Administrator Chad Rupe, *Funding Opportunity Announcement (FOA) and solicitation of applications for second round of the ReConnect Program*, Docket: USDA—2017—0002—0001, available at <https://docs.fcc.gov/public/attachments/DOC-363091A1.pdf> (Mar. 16, 2020). This likelihood will make exclusion of ReConnect census blocks from Phase I similarly problematic and ultimately result in less distribution of federal universal service funding to states.

⁴³ Although the Order discusses Phase II including unserved areas in partially served areas, it remains unclear whether census blocks that receive ReConnect funds will include such areas. *RDOF Order* at 13773.

IV. CONCLUSION

For the foregoing reasons, VTDPS respectfully requests that the Commission grant this petition for reconsideration and clarification.

Respectfully submitted,

By: /s/ Sarah L. J. Aceves
Sarah L. J. Aceves, Special Counsel
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/s/ June E. Tierney
June E. Tierney
Commissioner
Vermont Department of Public Service
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April 3, 2020

CERTIFICATE OF SERVICE

I hereby certify that I am electronically mailing a copy of the foregoing Petition for

Reconsideration today to the following individuals:

Austin Bonner
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Travis Litman
Arielle Roth
Preston Wise
Kirk Burgee
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/s/ Sarah L. J. Aceves
Sarah L. J. Aceves

April 3, 2020