Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Comment Sought on Competitive Bidding	)	AU Docket No. 17-182
Procedures and Certain Program	)	WC Docket No. 10-90
Requirements for the Connect America	)	
Fund Phase II Auction (Auction 903)	)	

To: The Commission

COMMENTS OF THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

Respectfully submitted,

WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

September 18, 2017 By: */s/ Chuck Hogg*, President
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SUMMARY

Rural Americans on the wrong side of the digital divide have the opportunity, through the Connect America Fund ("CAF") Phase II reverse auction, to be the beneficiaries of federal funding support for broadband deployment. To advance this opportunity, the Commission has proposed extensive applicant eligibility requirements and complex procedures to implement the first-of-its-kind reverse auction. In previous decisions, the Commission has wisely adopted rules that will encourage broad participation from broadband providers, large and small, without regard to the technology they plan to deploy.

Unfortunately, the approach proposed in the *Public Notice* would take several steps backward. Standing alone or taken together, if the proposals are adopted, fewer experienced broadband providers, especially small providers that can quickly deploy cost-effective fixed wireless networks to targeted areas, will be deemed eligible to participate. Competition for funding will be reduced to a few large companies, winning bids will be higher, and fewer areas will be funded. That outcome would undermine the objectives of the CAF program.

The Wireless Internet Service Providers Association ("WISPA") submits these Comments to highlight the problems inherent in certain of the Commission's proposals, and to offer recommendations that would improve the auction process. The goal is to ensure an inclusive, competitive, and streamlined auction process that promotes certainty, reduces subjectivity, and eliminates technological bias.

Given the complexity of the auction the Commission proposes, it will be essential for bidders, especially smaller ones that have never participated in a Commission auction before, to have access to third-party consultants. The Commission must ensure that there is no coordinated activity among competing bidders, but it must also allow bidders sufficient flexibility to engage

the expert assistance required to participate in the auction. Because bidding on one census block group is extremely unlikely to affect bidding on another census block group, WISPA proposes a "safe harbor" that would enable a consultant to represent one bidder in each census block group without being considered a potential conduit for prohibited communications.

The Commission proposes to require each applicant to respond to certain questions (Appendix A) to demonstrate that it has undertaken preliminary design of its proposed network. Commission staff would review responses under a subjective standard to assess whether the applicant is "reasonably capable" of meeting its public interest obligations. To simplify the process and remove subjectivity, the Commission should pose only "yes/no" questions.

The Commission also should not require a short-form applicant to certify its ability to serve every location in the relevant census blocks. This would place the applicant in the untenable position of having to certify at the short-form stage to a higher level of service than its professional engineer is required to certify in the long-form application. An applicant would be subject to a claim of misrepresentation if, for example, it made a certification of complete coverage and the professional engineer subsequently certified coverage of 98 percent of the required number of locations in each relevant state.

For the assumed subscription rate, WISPA does not oppose a requirement that an applicant demonstrate that its proposed network can, over the six-year build-out term, support a 70 percent subscription rate. A reasonable oversubscription rate must inform this assumption.

The Commission should add other spectrum bands and include spectrum leases in its non-exhaustive list (Appendix B). License renewals and lease extensions/renewals also must be inferred. Without such appropriate assumptions, rooted in long-standing Commission practice, no applicant proposing to use licensed spectrum could meet the Commission's requirement that

the spectrum to be "available" throughout the 10-year funding period because full wireless license terms are just 10 years long and any license already in effect would expire in less than 10 years. Regardless of technology, an applicant should be permitted to use any architecture or equipment that demonstrates its ability to meet the public interest obligations. No technology should be automatically precluded from use in a particular performance tier.

The Commission should reject its proposed five-point criteria to screen an applicant's financial qualifications. Broadband providers that re-invest capital into their networks would fail the test, as would every price cap carrier that is already receiving CAF support. The test will not accomplish the Commission's goal of making an initial determination about an applicant's financial qualifications, but will instead result in wasted time and effort because nearly every applicant would be subject to more in-depth review of audited financial statements. The Commission should instead adopt WISPA's recommendation.

The Commission also should extend the benefits of its *2012 Protective Order* to eliminate extra processing steps attendant to seeking confidential treatment. Because all privately-held entities seeking CAF support would be similarly situated with respect to such confidentiality requests, existing disclosure procedures should be extended to ensure equal treatment of applicants and to preserve Commission staff resources by eliminating the need to consider multiple requests of a similar nature.

Finally, WISPA notes that the Commission is proposing an extremely complicated auction that appears to be unnecessary to achieve its support objectives and is contrary to its intent to include a broad range of bidders. WISPA plans to work with other stakeholders in the coming weeks to try to develop a more streamlined and simplified auction that will encourage robust participation and competitive bidding.

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COMMENTS OF THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

The Wireless Internet Service Providers Association ("WISPA"), pursuant to Sections 1.415 and 1.419 of the Commission's Rules,[1] hereby addresses certain of the proposals in the above-captioned *Public Notice* seeking public comment on proposed eligibility requirements and competitive bidding procedures for the upcoming Connect America Fund ("CAF") Phase II reverse auction.[2]

WISPA endorses many of the proposals in the *Public Notice*. However, in a number of critical respects, WISPA believes that the Commission's proposed eligibility criteria would have the effect of disqualifying many experienced and well-financed potential bidders, especially smaller broadband providers, those providers that intend to rely on spectrum to meet performance requirements, and those that seek to re-invest revenues to expand operations. Such an outcome would seriously undermine the Commission's efforts over the last several years to adopt rules to encourage robust participation in the reverse auction by small providers. To address concerns that certain proposed application procedures and eligibility review will

[1] *See* 47 C.F.R. §§ 1.415 & 1.419.
[2] *See Public Notice*, "Comment Sought on Competitive Bidding Procedures and Certain Program Requirements for the Connect America Fund Phase II Auction (Auction 903)," AU Docket No. 17-182 & WC Docket No. 10-90 (rel. Aug. 4, 2017) ("*Public Notice*").

contravene that objective, WISPA makes specific recommendations that will promote technological neutrality and participation by "a broad range of providers" to ensure the success of the CAF auction.[3]

As regards the proposed mechanism for the reverse auction, the Commission proposes an exceedingly complex competitive bidding structure that is counterproductive to the Commission's objective "of maximize[ing] the number of consumers served within our finite budget" to help ensure that "rural America is not left behind."[4] If adopted as proposed, smaller companies will not be able to acquire the expertise necessary to participate in the auction, bidding will much less competitive, and fewer unserved areas will be served at higher prices. WISPA looks forward to working with other interested stakeholders to suggest ways in which the auction structure can be simplified to enable a more open and competitive process.

Discussion

I. THE COMMISSION SHOULD ADOPT ITS PROPOSAL FOR COMPETITIVE BIDDING BY CENSUS BLOCK GROUPS

Consistent with its previous statements,[5] the Commission proposes to conduct the reverse auction using census block groups as the minimum geographic area for bidding.[6] The Commission indicated that auctioning by census block groups rather than by larger census tracts "would not materially increase the complexity of the Phase II auction" and will "provide bidders with more flexibility to develop a bidding strategy that aligns with their intended network expansion or construction."[7]

[3] *See Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 5957 (2016) ("*Phase II Auction Order*").
[4] *Id.* (citation omitted).
[5] *See id.* at 5979.
[6] *See Public Notice* at 4 (¶ 12).
[7] *Id.* at 5 (¶ 13).

WISPA agrees that census block groups should be the minimum geographic bidding units for the Phase II auction. In this regard, WISPA notes the Commission's observation that using larger areas "could be particularly problematic for smaller providers that may seek to construct smaller networks or may seek to expand existing networks because a larger minimal geographic area, like a census tract or county, may extend beyond a bidder's service territory, franchise area, or license area."[8] Bidders that desire to obtain support to serve larger geographic areas can simply be the low bidder for all census block groups for which they desire support or, if the final auction procedures permit, engage in package bidding. Census block groups can serve as building blocks for larger geographic areas, whereas establishing larger geographic bidding areas would shut out some targeted service models and thereby limit the bidding pool. The Commission should adopt its proposal.[9]

II. THE COMMISSION SHOULD MODIFY CERTAIN OF ITS PROPOSED APPLICATION REQUIREMENTS

Although WISPA supports many aspects of the Commission's proposed application requirements, certain others would, if adopted, severely prejudice the ability of small, experienced and well-financed broadband providers – especially those relying on spectrum to fulfill their performance requirements – to participate in the auction. This result would squarely contravene the stated intention of the Commission to encourage participation by "a broad range of providers,"[10] including small, experienced broadband providers that the Commission has endeavored to include through its rules.[11] The bidding pool would inevitably shrink to include

[8] *Id.*
[9] The Commission has made clear that, for a given census block group, CAF recipients are not required to offer service to locations within individual census blocks already deemed to be served; indeed, census blocks that are deemed "served" are excluded from the list of census blocks that are eligible for the Phase II auction. *See, e.g., Phase II Auction Order*, 31 FCC Rcd at 5972 (¶¶ 65-66).
[10] *Id.* at 5957.
[11] *See id.* at 5983-84 and 5992 (Commission adopted rules permitting bidders, "particularly small entities," to provide audited financial statements post-auction and expanded the pool of banks eligible to issue letters of credit).

only large companies that are able to hire auction consultants, propose technologies that do not rely on spectrum, and can meet unnecessarily stringent financial qualifications – essentially, the same price cap carriers that declined the Commission's offer of support and can use the auction to obtain support in smaller, self-selected areas. With fewer bidders participating, it follows that the winning bids would be higher and thus fewer areas will obtain CAF support, contravening the Commission's stated intent "to maximize the number of consumers served within our finite budget"[12] and its desire to include smaller service providers among the auction participants. The Commission can avoid this outcome by adopting WISPA's recommendations described below.

A. The Commission Should Adopt A "Safe Harbor" To Create Greater Certainty To Bidders That Want To Engage Third-Party Consultants

The *Public Notice* includes a summary discussion of guidelines the Wireless Telecommunications Bureau ("WTB") previously adopted in the context of spectrum auctions, and seeks comment "on whether there are alternative procedures that we could adopt that would be equally effective in preventing the competitive harm from coordinated bidding that we seek to avoid."[13] The *Public Notice* observes that "WTB has expressed particular concerns about employing the same individual for bidding advice."[14]

WISPA, together with the American Cable Association and NTCA – The Rural Broadband Association, trade associations that represent small broadband providers, recently submitted a letter expressing concerns over the complexity of the auction and the need for bidders to retain qualified consultants to assist them.[15] The ex parte letter "encourage[s] the Commission to adopt a flexible interpretation of its anti-collusion rules" in order to allow bidders

[12] *Id.* at 5957.
[13] *Public Notice* at 7 (¶ 21), *citing Public Notice*, "Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000," 30 FCC Rcd 10794 (WTB 2015).
[14] *Id.*
[15] *See* Letter from Ross Lieberman (ACA), Michael Romano (NTCA) and Stephen Coran (WISPA) to The Hon. Chairman Ajit Pai, *et al.*, AU Docket No. 17-182 and WC Docket No. 10-90 (filed Sept. 15, 2017) ("ACA/NTCA/WISPA Letter").

to "share the costs of a single expert."[16] Without such flexibility, the complexity of the auction process, coupled with the finite number of qualified consultants capable of providing critical expertise on bids and bidding strategies in a first-ever reverse auction for subsidies, would deter would-be bidders from participating at all.

It is important to understand that the CAF reverse auction will be unlike any spectrum auction and single-round auction the Commission has ever conducted, and that the nationwide, multiple-round descending clock auction for support in which bidders may be able to change their bidding weights round-by-round presents unique issues. First, although the CAF auction is ostensibly a nationwide auction, it will include 36,000 census block groups.[17] Hence, a bid in one census block group in one part of the country would have, at most, an extremely remote effect on a bid in another census block group in another part of the country, such that the potential for collusion through a consultant advising both bidders would be inconsequential. Second, bidders will be bidding for small, discrete areas that are unique to their business models and likely contiguous to or near their existing operations, further reducing the likelihood of coordinated action that could skew the auction results.

To mitigate uncertainty involving activities that might raise concerns about prohibited communications while still ensuring that the opportunity for collusive behavior is minimized, WISPA asks the Commission to adopt a "safe harbor" of conduct that will be deemed to *not* be a violation of the Commission's anti-collusion rules. Under this approach, a bidder would *not* be in violation of the anti-collusion rules if its consultant does not advise another applicant bidding *for the same census block group*. WISPA believes that this "safe harbor" will provide greater certainty to would-be bidders to participate in the auction, enable consultants to better prepare

[16] *Id.* at 2.
[17] *See Public Notice* at 4 (¶ 12).

more bidders, and ensure that bidders are better informed to make decisions during the course of the auction. Given the large number of census block groups available for auction, their small size, and the improbability that a bid for one location may affect a bid for another location, WISPA believes that this is a reasonable and appropriate interpretation of the anti-collusion rules for purposes of the CAF Phase II auction.

WISPA fully appreciates that consulting firms should establish appropriate internal safeguards and firewalls to ensure that they do not act as conduits for prohibited communications between or among bidders, and that bidders must ensure that their consultants are not compromising their compliance with Commission rules. However, the Commission should establish a "safe harbor" that there is no violation of the Commission's rules where bidders are not competing for support for the same census block group.

B. A "Change In Control" Should Not Disqualify A Bidder From the Auction

Section 54.315(b)(6)(iv) prohibits an applicant from undergoing a change in control after the short-form application is filed and before Phase II support is authorized.[18] This rule was adopted in the *Phase II Auction Order* without explanation or any support in the record.[19] And, while no party has sought reconsideration, strict interpretation of this rule may inhibit arms' length market transactions that would inject investment capital into broadband deployment. Commission rules should not be applied so rigidly if the effect will be to sideline or delay private investment for broadband deployment.

Accordingly, the Commission should entertain waivers of its rules to allow an applicant to propose a change in control during the auction upon a showing of good cause. The good cause

[18] *See* 47 C.F.R. § 54.315(b)(6)(iv).

[19] Similar provisions have been adopted for other universal service support auctions with general reference to the Commission's Part 1 Rules, but with a similar absence of concrete explanation or record support. *See, e.g., Connect America Fund*, 26 FCC Rcd 17663, 17804 n.703 (2011), *citing* 47 C.F.R. § 1.21001(d)(4) ("Applicants will only be able to make minor modifications to their short-form applications. Major amendments, for example, changes in an applicant's ownership that constitute an assignment or transfer of control, will make the applicant ineligible to bid").

showing would, at a minimum, need to demonstrate based on the applicant's audited financial statements, if provided in the short-form application, that the change in control would not adversely impact the applicant's financial eligibility.

C. The Commission Should Modify Its Proposed Auction Eligibility Requirements

The Commission proposes requiring each bidder to submit "additional high-level operational information" in its short-form application to enable Commission staff to evaluate applications under a standardized process.[20] Although WISPA does not object to this proposal generally, the specific proposals described by the Commission are not technologically neutral, disfavor those entities proposing to meet their performance requirements with spectrum-based solutions, and disadvantage small companies. Moreover, in assessing performance tier showings, the Commission proposes that its staff determine whether the proposal is "reasonably capable of meeting the relevant public interest obligations for each state it selects,"[21] a subjective standard that may subject short-form applications to differing and inconsistent interpretations based on the bureau or individual that undertakes the review.

In sum, the proposed gating criteria and review thereof would erect barriers to participation that would preclude experienced broadband providers from participating, in contravention to Commission objectives and to the detriment of rural Americans that would benefit from robust participation and competition for Phase II support. To address these concerns, WISPA recommends adoption of a number of essential changes.

[20] *Public Notice* at 10 (¶ 29).
[21] *Id.* at 11 (¶ 34).

1. The Commission Should Modify Appendix A To Remove Unnecessary Inquiries And Inherent Subjectivity

The Commission proposes to require each applicant to answer a series of questions concerning its operational experience for each state it selects in its short-form application.[22] WISPA does not object to a simple, easy-to-implement screening approach, but certain of the questions proposed in Appendix A appear to be unnecessary and will increase Commission staff processing resources and time, while others are not technologically neutral and disfavor those applicants that plan to use spectrum to meet their performance requirements. In general, Appendix A should exclude any questions that require narrative responses, a change that would reduce both subjectivity and processing time in the short-form review process. WISPA's specific recommendations follow.

- In responding to a question proposed in the introductory section of Appendix A, an applicant may be reluctant to provide in its short-form application information on the number of subscribers it served. There are two problems with this question. First, by using the past tense "served," an accurate response would require the applicant to calculate the total number of subscribers in a state that it has served since the provider began offering service, including those that may have disconnected years ago. Second, the number of then-existing subscribers is typically confidential in FCC Form 477 reports. An applicant thus would be required to take the extra step of seeking confidential treatment under Section 0.459 of the Commission's Rules, adding time and expense to the short-form application and requiring Commission staff to review and determine that confidential treatment is appropriate. A response to this question is burdensome and unnecessary for the purpose of establishing operational proficiency, and the question therefore should be eliminated.

- Question 2 implies that an applicant relying on non-standards-based equipment could be found to be unqualified when, in fact, there are many proprietary sources of equipment and technology that have proved to be adequate and, perhaps, exceptional, inasmuch as standards tend to reflect well-established, not leading-edge, technology. The Commission itself does not maintain an approved list of standards or accredited standards bodies, and thus there is not even a firm definition of what is and isn't standards-based. It also may be true that new equipment will be available after the

[22] *See id.* at 12 (¶ 35). WISPA suggests that information be provided according to the performance tier(s) selected – a maximum of four sets of responses – rather than according to the state(s) an applicant selects in its short-form application. In this manner, Commission staff resources can be allocated based on a particular individual's knowledge of and training on technology appropriate for each performance tier.

short-form application is filed, placing at risk an applicant that may decide to change equipment from non-standards-based to standards-based (or vice versa) to increase performance, reduce price or for other benefits.[23] Further, the word "features" is vague. Question 2 also should be eliminated.

- In Question 3, the Commission proposes to require information on "assumptions about subscription rate and peak period data usage"[24] – an open-ended question that could be viewed as an opportunity for Commission staff to substitute its judgment and deem a broadband providers' assumptions to be disqualifying. The proposed question also would require a list of information "that can be made available" to support the assumptions.[25] These parts of Question 3 should be eliminated such that only the "yes/no" question in the first sentence is required to be answered. To the extent Question 3 remains, the word "can" should be changed to "would, if the applicant is a winning bidder."

- In Question 4, the phrase "can make available" should be clarified to mean "would, if a winning bidder, make available." Further, the use of the verb "describe" in the second sentence is too open-ended and subjects applicants to differing interpretations. For instance, one Commission staff member may believe a description to be acceptable while another may not. This second sentence should be eliminated to avoid disparate interpretations of descriptive responses.

- The first sentence in Question 5 can be construed to require an applicant to have made all of its vendor, equipment and technology decisions prior to filing its short-form application. Given that the applicant will not know in advance which census block groups it will win, if any, this question would be impossible to answer with any reasonable degree of certainty. Also, as is the case with Question 4, the phrase "can the applicant demonstrate" should be clarified to mean "would the applicant demonstrate, if a winning bidder." The verb "can" also is inconsistent with the verb "could" in the following sentence. This question should be reduced to one that simply asks whether the applicant has conducted due diligence on potential vendors, integrators and other partners. That should be sufficient to give the Commission the information it requires to determine whether the "applicant has developed a *preliminary* design or business case for meeting the public interest obligations."[26]

- Like Question 5, Question 6 implies that an applicant must have prepared a detailed financial analysis notwithstanding the fact that it has no idea which or how many census block group(s) for which it may be the successful bidder or the amount of support it may receive. It is impossible to answer this question with any degree of reliability. Moreover, the question appears to favor applicants that have internally-

[23] Fixed wireless equipment is not as often standardized as mobile systems. In the fixed marketplace, both the customer-premise device and the base station are typically under network operator ownership, and thus there is no need for a standard to enable the customer to purchase devices from a choice of manufacturers.
[24] *Public Notice* at 40, Appendix A.
[25] *Id.*
[26] *Public Notice* at 12 (¶ 35) (emphasis added).

> developed operations systems and can respond "yes or no" over an applicant that chooses to rely on externally-developed operations systems and would need to prepare more detailed information. Question 6 should be reduced to the initial "yes/no" question presented in the first sentence, and the phrase "Can the applicant describe" be changed for the purpose of clarity to "Will the applicant be able to describe in its long-form application."

Not only are the above-discussed questions unnecessary to meet the Commission's objectives, the Commission further proposes that each applicant must show that it is "reasonably capable" of meeting its proposed public interest obligations."[27] Here, the problem is that each staff member may take a different view of the same responses. For instance, Commission staff reviewing an application for Kansas may have a different interpretation of "reasonably capable" than the staff that is reviewing an application for Ohio. A particular "short, narrative response" may be found to be acceptable in some cases, but insufficient in others.[28] Moreover, some staff may have a good understanding of certain technologies but not others, or may decide that standards-based technologies are "better" than non-standards-based technologies.

To overcome the problem inherent in a subjective "reasonableness" standard with multiple staff involved, the Commission should simply rely on "yes/no" questions. An applicant that responds "yes" to all of the relevant questions will be deemed qualified, and an applicant that responds "no" to one or more questions will be asked to respond to additional questions. This approach will not only reduce the potential for inconsistent processing and save administrative processing time, it will also lower the potential for human error, which could lead to experienced broadband providers being deemed ineligible to participate.

[27] *Id.* at 11 (¶ 34).
[28] *Id.* at 12 (¶ 35).

2. The Commission Should Not Require Short-Form Applicants To Demonstrate Their Ability To Serve Every Location In The Relevant Census Blocks

The Commission seeks comment on a suggestion that it should require an applicant "to demonstrate that its network could be engineered to deliver the required service to every location in the relevant census blocks."[29] The Commission should reject this suggestion for at least two independent reasons.

First, adding this requirement to the short-form application would be tantamount to adopting a new rule. In the *Phase II Auction Order*, the Commission adopted a rule, after notice and comment, requiring a professional engineer to certify in long-form applications that the proposed network is capable of delivering voice and broadband service to 95 percent of the required number of locations in each state.[30] The Commission did not require an applicant to demonstrate in its short-form application an ability to serve *all* locations in the relevant census blocks. The Commission should not, through a *Public Notice* regarding auction procedures, adopt a substantive rule that, as described below, could effectively eliminate bidders and create unnecessary, new opportunities for liability.

Second, the proposed requirement is vastly at odds with the long-form requirement specified in Section 54.315(b)(2)(iv). It would place the engineering burden on *applicants at the short-form stage*, not professional engineers at the long-form stage. It would fundamentally *increase* the network capability from 95 percent to 100 percent. And it would require that *all* locations in the census block be covered, not just "the required number of locations in each

[29] *Id.* (¶ 36).

[30] *See* 47 C.F.R. § 54.315(b)(2)(iv). In its ex parte letter suggesting this new gating criterion, a rural coalition argues that it would be "insufficient" to engineer a network "to meet less than 100 percent of households." *See* Letter from Rebekah P. Goodheart to Marlene H. Dortch, FCC Secretary, WC Docket No. 10-90 (filed Jan. 19, 2017), at 8. To the contrary, it may be unwise for a bidder to offer service where service is already being provided by other entities.

relevant state."[31] So the denominator to achieve 100 percent would be higher. The demonstration would be required *before* the applicant even commenced bidding, not after. The proposed standard is demonstrably more difficult to achieve than the one the rule requires.

Adopting a higher standard for an applicant – not an engineer – would require non-engineers to swear under penalty of perjury to a standard that a professional engineer may not. The result of this disparity would be that a potential applicant may be unable to make a certification that its technical expert could not make, and that bidder would have the resulting choice of either simply not participating in the auction or subjecting itself to a claim of perjury that is not intended by the short-form application rules. If an applicant is required to certify to something in a short-form application that its engineer might not, it effectively makes the professional certification requirement meaningless while subjecting a non-expert applicant to liability.

It is not difficult to imagine a scenario where an applicant certifies in its short-form application that it can serve 100 percent of *all* locations and its professional engineer subsequently certifies that the applicant can serve 95 percent of the "required number of eligible locations." Despite meeting the letter of the rule, the applicant would be subject to a claim of misrepresentation for false certification. The winning bidder might then be disqualified and the locations in the census block group(s) would not receive Phase II support, to the detriment of consumers in the affected area. The Commission must avoid this result by relying on its existing rules and rejecting arguments that would erect unnecessary barriers to auction participation.

[31] 47 C.F.R. § 54.315(b)(2)(iv).

3. The Commission Should Permit Short-Form Applicants To Demonstrate An Ability To Meet A 70 Percent Subscription Rate As Of The End Of The Six-Year Build-Out Period

The Commission asks whether an applicant should be required to assume a subscription rate of 70 percent for voice service, broadband service, or both.[32] If this proposal is adopted without qualification, it would unfairly prejudice the ability of an applicant, including one relying on spectrum, to fulfill its public interest obligations, to build its network incrementally and thereby defeat the Commission's objective of ensuring that the rules are applied in a technologically neutral fashion. WISPA recommends that a subscription rate assumption be qualified in the manner described below.

The assumed subscription rate should increase over time to accommodate the manner in which fixed wireless networks and other broadband networks are typically built. It is not realistic to expect that a short-form application demonstrate that, on Day One, the network will support a 70 percent subscription rate and that 70 percent of the unserved homes will subscribe on Day One. Rather, as is the case with deployment milestones that appropriately do not assume completion of the supported project on Day One, the assumed subscription rate should be increased over time to reflect the fact that providers upgrade networks to add capacity as more consumers subscribe, and that consumer uptake rates will vary considerably based on such market-specific factors as the provider's initial market position, local economic conditions, geography, terrain, and population density. WISPA believes that it would be appropriate to require an applicant, regardless of the access technology or technologies it plans to deploy,[33] to project attainment of the assumed subscription rate over time, with the understanding that

[32] *See Public Notice* at 12 (¶ 36).
[33] WISPA agrees that subscription assumptions should be applied uniformly to all short-form applicants, regardless of the technology or technologies they plan to deploy. *See* Letter from Rebekah P. Goodheart to Marlene H. Dortch, FCC Secretary, WC Docket No. 10-90 (filed July 26, 2017), at 5.

different service providers will ramp up at different rates and be subject to different near-term deployment considerations and objectives. Accordingly, it would be appropriate for the Commission to establish an assumed subscription rate of 70 percent as of the Year Six construction milestone rather than at the outset, with each applicant left to determine its path toward that assumed rate. This would conform the deadline for the 100 percent build-out requirement to the 70 percent subscription rate assumption.

Further, in evaluating subscription rates, the Commission must account for oversubscription metrics that are based on how capacity and throughput are measured. Fixed wireless networks are not designed to accommodate all users simultaneously using the fastest speed to download large data files during peak usage periods. Rather, operators make certain assumptions based on their experience to determine the number (or percentage) of subscribers that are likely to be downloading and uploading material to the Internet at a given time at a given speed, and design their systems according to reasonable usage assumptions based on their experience.

4. The Commission Should Modify Its Proposed Requirements For Spectrum-Based Applications

The Commission proposes to require an applicant intending to use spectrum to submit additional information in its short-form application to show that it is "reasonably capable" of meeting its public interest obligations.[34] WISPA observes that the Commission proposes *only* to subject an applicant proposing to use spectrum to this gating requirement, in contravention to the Commission's stated desire to have technology neutral rules that promote participation by a broad range of bidders.[35] For example, the Commission is not proposing to require an applicant proposing to use fiber to demonstrate that it has access to rights-of-way or utility poles for the

[34] *Public Notice* at 13 (¶ 37).
[35] *Phase II Auction Order* at 5957.

10-year CAF Phase II support term. In some areas, access to such infrastructure may be more limited or more difficult to obtain than spectrum, and therefore more probative of the applicant's ability to provide acceptable service. Establishing a hurdle for one class of applicants – those that rely on spectrum – would potentially *exclude* a would-be participant that might fall just short in meeting Commission staff's interpretation of the subjective "reasonably capable" test in a given case, and *include* a bidder that does not have to even demonstrate access to any infrastructure access rights. Such a result would be the antithesis of the technological neutrality the Commission has sought to create.

The Commission can remedy this gross disparity by establishing a "safe harbor" for any applicant proposing to use any licensed or unlicensed bands that historically have been used to provide the performance tier selected. A "safe harbor" removes some subjectivity from the short-form application review process, creating greater certainty among applicants, saving administrative resources, and potentially shortening the time between the short-form deadline and the commencement of bidding. The Commission also should require an applicant proposing to use satellite, fiber or other distribution technology to show that they have access to rights-of-way, poles and other necessary infrastructure access components used in the technical design of the network for which funding is sought. Taking these two actions will make the playing field more even, provide greater certainty to applicants on those spectrum bands that are *per se* acceptable, reduce subjectivity in the review process, and shorten the time it takes for Commission staff to review short-form applications.

The Commission also should clarify and modify its specific proposals for spectrum-based applications.[36] First, the Commission should make clear that an applicant can propose to use

[36] The Commission specifically proposes that "an applicant (i) identify the spectrum band(s) it will use for last mile, backhaul, and any other parts of the network; (ii) describe the total amount of uplink and downlink bandwidth (in

more than one spectrum resource for last-mile, backhaul, and other parts of the network, and can combine wireline, wireless, and satellite resources in its application. An applicant applying to bid for more than one census block group also should have the right to propose different distribution technologies based on the performance tier(s) it selects, size of the geographic area(s), topography, demography, location of the unserved locations, and other factors. Such flexibility may be implicit in the Commission's proposed language, but the final application procedures should be explicit.

Second, the Commission must clarify that an applicant can rely on leased spectrum as well as licensed and unlicensed spectrum. For instance, some fixed wireless providers today lease Educational Broadband Service ("EBS") spectrum from licensees and offer commercial service under such leases pursuant to the Commission's Part 27 rules.[37] These providers should not be excluded from participating in the auction, especially considering that the area they lease under an existing agreement may cover unserved census blocks available at the auction.

Third, the Commission should infer the renewability of licenses and spectrum leases (the latter for the duration of the lease term and any contemplated renewals or extensions) in considering spectrum-based proposals. To do otherwise would remove from consideration those licensees relying on, say, a Part 101 microwave backhaul license that has eight years remaining, even though it can be routinely renewed for an additional 10 years. Likewise, EBS spectrum can be leased for up to 30 years, often at the lessee's exclusive option. The Commission must be able to infer that licenses and leases can be renewed in determining whether the spectrum will be available for the 10-year support term. Otherwise, no spectrum-holder would be able to qualify

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megahertz) that it has access to in such spectrum band(s) for last mile; (iii) describe the authorizations it has obtained to operate in the spectrum, if applicable; and (iv) list the call signs and/or application file numbers associated with its spectrum authorizations." *Public Notice* at 13-14 (¶ 39).

[37] *See* 47 C.F.R. § 27.1214. WISPA notes that proposed Appendix B includes both Broadband Radio Service and EBS as spectrum bands that it anticipates can be used for last-mile services.

because the remaining terms of existing licenses will always be less than 10 years from the short-form filing deadline.

Fourth, the Commission should add the words "if applicable" at the end of clause (iv) to make clear that unlicensed spectrum (which does not have call signs or application file numbers) can be used, consistent with the Commission's decision to permit an applicant to rely on unlicensed spectrum and clause (iii).

The Commission also should make a number of additions to Appendix B, which lists the spectrum the Commission "anticipate[s] could be used for the last mile to meet Phase II obligations."[38] In response to the Commission's request for comment,[39] the Commission should make clear that Appendix B is not exhaustive and that an applicant can propose to use other spectrum bands if it can demonstrate that it can satisfy the public interest obligations. But, to eliminate doubt at the outset, the Commission also should add the following frequency bands as further examples to its non-exhaustive list of spectrum bands:

- TV White Space (Unlicensed)[40]
- 902-928 MHz (Unlicensed)
- 3650-3700 MHz (Licensed)[41]
- 5250-5350 MHz and 5470-5725 MHz (Unlicensed)[42]
- 37000-37600 MHz (Licensed)[43]
- 57000-71000 MHz (Unlicensed)[44]

[38] *Public Notice* at 14 (¶ 40).
[39] *See id.*
[40] *See* 47 C.F.R. § 15.701, *et seq.*
[41] The Commission includes this band under "CBRS (3.5 GHz)." However, the 3650-3700 MHz band has been a licensed service under Part 90 since 2008. CBRS is a Part 96 service.
[42] *See* 47 C.F.R. § 15.407(a)(2). Like the other 5 GHz and 2.4 GHz bands the Commission has identified on Appendix B, these bands are typically used by fixed wireless broadband providers today.
[43] *See* 47 C.F.R. § 30.7.
[44] *See* 47 C.F.R. § 15.255

- 70/80/90 GHz (Licensed)[45]

Finally, WISPA anticipates that the Bureau will seek assistance from WTB (for applications or portions thereof proposing to use licensed spectrum), the Office of Engineering and Technology (for applications or portions thereof proposing to use unlicensed spectrum), and the International Bureau (for applications or portions thereof proposing to use satellite technology) in reviewing the spectrum information that an applicant may be required to submit in its short-form application.

5. An Applicant Should Not Be Limited In Its Selection Of Performance Tier And Latency Combinations

The Commission asks whether an applicant should be limited to specifying performance tier and latency combinations "that they or similar providers are currently offering."[46] The critical point is whether the applicant demonstrates its ability to meet its selected performance tier(s) and the post-auction build-out requirements, irrespective of the technology the applicant plans to use. There should be no special rules or special showings for any technology or class of bidder, just the requirement to satisfy the public interest obligations. To this end, the Commission should not automatically preclude bidders that may have the capacity, if not the direct experience, from deploying broadband in a novel manner. For example, a particular fixed wireless provider may have not yet deployed updated technology but should have the ability to propose such technology in its application. Likewise, an applicant that has deployed DSL should not be prohibited from proposing fiber, wireless, satellite, or any combination of access technologies as part of its network. Moreover, an applicant should not be limited to existing technology, but should be able to demonstrate performance based on probable product releases. In some cases, an applicant may be under a non-disclosure agreement with a manufacturer or

[45] *See* 47 C.F.R. § 101.1501, *et seq.*
[46] *Public Notice* at 17 (¶ 50).

may know of an imminent or probable product release. It should be able to specify such technology and performance as part of its application.

Restricting an applicant to specific historical performance tier and latency combinations also could have the perverse effect of allowing an applicant that may be totally inexperienced in providing broadband service (e.g., a gas station that has three years of audited financial statements) to be eligible but disqualify, say, an electric utility that has not provided broadband or a fixed wireless provider that desires to incorporate fiber into its network architecture. The Commission must avoid this result, and can do so by allowing experienced providers to propose performance tier and latency combinations that they may not have previously deployed.

Finally, the term "similar providers" is inherently subjective and could lead to debate over what may be "similar" and what may not be. The Commission therefore should permit an applicant to specify whatever technology or technologies that it can demonstrate that it can deploy to meet the performance tier and latency combinations it selects.

6. WISPA Supports Other Commission Application Proposals

The Commission should adopt a number of the other *Public Notice* proposals. WISPA highlights two.

First, allowing an applicant to have the opportunity to revise and resubmit its short-form application if the Commission determines that the initial application does not demonstrate the applicant's ability to meet the public interest obligations.[47] The applicant should have the option to submit information demonstrating that the performance tier and latency combination it initially proposed is acceptable, submit information demonstrating eligibility for a lower performance tier and latency combination, or a combination of both options on an area-by-area

[47] *See id.* (¶ 53).

basis.[48] Of course, by adopting the "safe harbor" and other recommendations described above, WISPA anticipates that a large amount of the subjectivity inherent in the "reasonably capable" standard can be addressed, and that the number of applications subject to resubmission process will be limited.

Second, WISPA strongly agrees with the Commission that it should not adopt any additional non-compliance measures.[49] The reasons the Commission cites in the *Public Notice* explain that existing certification requirements, compliance measures and enforcement rules are sufficient to govern non-compliance.[50] In addition, the Commission is proposing detailed short-form vetting of applicants and application proposals that also will act to identify potential non-compliance.

III. THE PROPOSED FINANCIAL QUALIFICATION CRITERIA ARE EXTREMELY ONEROUS AND COULD DISQUALIFY A LARGE NUMBER OF EXPERIENCED BROADBAND PROVIDERS FROM PARTICIPATING IN THE AUCTION

A. The Commission Should Not Adopt Its Proposed Five-Part Screening Test

The Commission proposes to adopt a five-point test to "quickly and efficiently" evaluate an applicant's financial qualifications.[51] An applicant scoring less than three points or a score of zero for two of the proposed metrics – the ratio of current assets to current liabilities and the total equity divided total capital – would be subject to greater scrutiny of the financial statements

[48] *See id.* at 18 (¶ 53). WISPA presumes that Commission staff will have engaged with the applicant and communicated the Commission's specific concerns in order to provide the applicant with sufficient guidance for its resubmission. Simply rejecting an application without any explanation would provide the applicant with no insight into where the Commission perceived the application to be "reasonably incapable."
[49] *See id.* (¶ 54).
[50] *See id. See Connect America Fund, et al.,* Report and Order, 29 FCC Rcd 15644, 15693-15701 (2014) (adopting non-compliance measures).
[51] *Public Notice* at 19-20 (¶¶ 58-60). In addition to the gating criteria, the Commission requires CAF Phase II recipients to obtain irrevocable letters of credit and bankruptcy opinion letters as security for default and non-satisfaction of program obligations. *See* 47 C.F.R. § 54.315(c).

submitted with the application, as well as other unspecified information.[52] The table below describes the Commission's proposal:

If the applicant has audited financial statements, did it receive an un-modified (non-qualified) opinion?	Yes	+1
Operating margin	>0	+1
Times Interest Earned Ratio (TIER)	>=1.25	+1
Ratio current assets/current liabilities	>=2	+1
Total equity/total capital (total equity plus total liabilities)	>=0.5	+1

The Commission should reject this approach *in its entirety*. It would unfairly and without any stated grounds hold CAF Phase II applicants to a higher standard than price cap carriers that have accepted 10 times more federal support dollars than is available for all Phase II recipients combined. It would penalize those applicants that re-invest capital into network upgrade and expansion over those that keep cash on hand. It would especially prejudice small broadband providers, regardless of the technology or technologies they propose because they do not maintain a capital structure similar to large publicly traded companies. If the Commission were to apply its proposed test, it would be *less* quick and *less* efficient because Commission staff would almost always be required to undertake the "more in-depth review of the full set of financial statements" – the intended screen would be totally ineffective. And, beyond that in-depth review, the Commission proposes no standard at all to determine an applicant's financial qualifications.[53]

To illustrate the overarching problem with the Commission's proposed test, WISPA reviewed financial information that publicly traded price cap carriers most recently submitted to the Securities and Exchange Commission. Based on WISPA's analysis, at least three price cap

[52] *See Public Notice* at 19 (¶ 58).

[53] The Commission cites its "experience with the rural broadband experiments" as the basis for its proposed criteria. *See id.* However, neither the order adopting the rural broadband experiment requirements nor the public notice announcing application procedures cited any methodology for reviewing bidders' financial requirements in that program.

carriers would not achieve a score of three on the Commission's proposed scale, and no price cap carrier would achieve a score above three. Every price cap carrier would receive zero points for both the ratio of current assets to current liabilities criterion (all reported a ratio of less than one) and the total equity/total capital criterion (all reported a ratio of less than .30) – the two metrics that, standing alone, under the Commission's proposal, would require in-depth review. Not only are these price cap carriers stewards of 10 times the amount of support than the amount of support available for the entire Phase II program, but all of the price cap carriers would be subject to second-level review and could ultimately be deemed unqualified to participate in the Phase II auction.

If large, well-established price cap carriers cannot meet the Commission's test, then it is highly probable that a vast number of potential smaller bidders would similarly fall short. The Commission will then have spent significant time and effort doing its initial scoring without adequately determining eligibility to participate in the auction.

The problem is not the ability of applicants to meet the test, but with elements of the test itself that do not determine whether an applicant is financially qualified. Generally speaking, it emphasizes financial metrics that are inappropriate to use as a screening mechanism and that contradict sound fiscal management by broadband providers, and rewards applicants that are not investing capital to grow their businesses. In other words, the Commission is proposing a test that will not determine an applicant's financial qualifications to deploy voice and broadband, however "financial qualifications" may be defined. Below, WISPA comments on each of the five proposed criteria.

Unqualified auditor's opinion – This proposed criterion may appear valid in the abstract, but unexplained is how the Commission will review applications submitted by those that submit

unaudited financial statements because they do not have audited financial statements. Would this criterion be ignored, or would the applicant automatically be assigned a score of zero or a provisional score of one? The Commission should neither favor nor disfavor any applicant, whether it provides audited financial statements as part of the short-form application or whether it certifies that it will provide audited financial statements post-auction. If the Commission cannot guarantee absolute equivalence, then it should remove this criterion from its initial screening test.

Operating margin – The Commission proposes that an applicant have an operating margin of >0 to avoid the in-depth review. This proposed criterion does not account for the impact of depreciation and other significant non-cash charges associated with the capital intensive telecommunications industry. Given the significant investments and long-term nature of broadband deployments, a more accurate indicator of a company's financial health is its EBITDA margin, with EBITDA calculated as operating profit, plus depreciation expense, plus amortization expense.

Times Interest Earned Ratio – The Commission proposes that an applicant with a Times Interest Earned Ratio (TIER) of >=1.25 would receive one point, and that any applicant failing to meet this value would be subject to more in-depth scrutiny. A more appropriate measure of a broadband company's ability to service its debt obligations is the interest coverage ratio, defined as EBITDA over interest expense, which accounts for depreciation and other significant non-cash charges associated with this capital intensive industry.

Ratio of current assets/current liabilities – Here, the Commission proposes that current assets exceed current liabilities by at least two. This criterion ignores the fact that broadband companies are inherently capital intensive, and many firms, especially smaller providers and

recent market entrants are aggressively investing in network upgrades and expansion. Companies that are growing and investing in their future rapidly reinvest available cash. As proposed, the commission's criteria would act as a disincentive to broadband deployment and investment. No price cap carrier indicated in their public financial information that they could achieve this ratio; in fact, no price cap carriers exceeded a ratio of 0.99. This metric has no place in a capital-intensive industry and should be eliminated.

Total equity/total capital – The Commission proposes a total equity/total capital ratio of >=0.5. As with the other proposed factors, achieving this ratio would be bad business for broadband companies that desire to maximize returns to equity to minimize the ratio of total equity to total capital. It would also penalize companies that are financed by debt and those that finance high-cost fiber over long terms. As discussed above, no price cap carrier met the proposed threshold of 0.5, with the highest ratio being 0.30. This metric has no place in a capital-intensive industry and should be eliminated.

In sum, the proposed five-point screening test is a very poor way to analyze the predicted financial viability of an applicant, and it would be a waste of the Commission's scarce resources to undertake this analysis. The Commission would not achieve its desired result of easily qualifying some applicants and leaving others for more in-depth review because *virtually all* would fail the proposed screen.

B. The Commission Should Adopt An Alternative Financial Screening Mechanism

Instead of the problematic and inappropriate test the Commission proposes, the Commission should instead adopt a different and simpler review model. The Commission should consider only an applicant's EBITDA margin. If that margin is below ten percent (10%), then the Commission should undertake its more in-depth financial analysis.

The Commission also will be obtaining applicant certifications with respect to the requirement to provide audited financial statements, and applicants will be required to obtain irrevocable letters of credit. These procedures and rules are more than adequate to ensure that applicants are financially qualified and face severe consequences if they misrepresent information, fail to deliver post-auction documents and fail to meet the deployment requirements. The Commission also can use the annual Form 481 report to monitor compliance.

IV. THE COMMISSION SHOULD ADOPT PROCEDURES TO PROTECT CONFIDENTIAL INFORMATION

In the *Public Notice*, the Commission proposes to withhold from public inspection "financial information submitted by an applicant that also files financial information on FCC Form 481 pursuant to a protective order."[54] It specifically makes reference to the Protective Order adopted in 2012 at the instruction of the Commission in its CAF Fifth Order on Reconsideration, where it cited a need to protect from public disclosure the financial information of privately-held rate-of-return carriers.[55] The *Public Notice* goes on to state that "[a]ll other applicants may request confidential treatment of their financial data by submitting a request under Section 0.459 at the same time such information is submitted."[56]

WISPA does not see any reason for the Commission to provide a two-tiered system for protection of sensitive financial information, which would require all applicants not expressly covered by the prior *2012 Protective Order*[57] to expend time, effort and money articulating similar justifications for confidential treatment of such financial data, and in turn, would require FCC staff to evaluate and act upon each such request on a case-by-case basis. This approach is

[54] *Public Notice* at 36 (¶ 139).
[55] *Id*. & n.148, *citing Connect America Fund et al.*, Fifth Order on Reconsideration, 27 FCC Rcd 14549, 14565-66 (2012).
[56] *Public Notice* at 36 (¶ 139).
[57] *See Connect America Fund et al.*, Protective Order, 27 FCC Rcd 14231 (WCB 2012) ("*2012 Protective Order*").

neither equitable nor administratively efficient given the high likelihood that substantial numbers of applicants that are not privately-held rate-of-return carriers will seek confidential treatment of the sensitive financial information that they submit in connection with the auction. These entities would justifiably have the same concern articulated in the *2012 Protective Order* that the information provided "is especially competitively sensitive and, if released to competitors or those with whom a Submitting Party does business, might allow those persons to gain a significant advantage in the marketplace or in negotiations."[58] Moreover, the Commission can similarly afford "appropriate access to the public while protecting especially competitively sensitive information from improper disclosure" using the very same certifications and disclosure procedures employed in the *2012 Protective Order*, which were affirmatively found to serve the public interest.[59] Accordingly, the Commission should extend the scope of the original *2012 Protective Order t*o apply to any privately-held applicant seeking to participate in the CAF Phase II auction. Such an approach would promote fairness to all applicants, eliminate the obligation of some (but not all) applicants to expend resources preparing and filing a separate request for confidential treatment, and prevent the squandering of Commission staff resources on consideration of multiple similar requests for relief from financial disclosure obligations.

V. THE COMMISSION SHOULD RE-EVALUATE AND SIMPLIFY THE INORDINATELY COMPLEX CAF II AUCTION DESIGN.

The Commission has proposed procedures for the auction that encompass a host of independently interacting variables, including such features and factors as package bidding, changing performance tiers, bidding across 36,000 geographic areas, proxy bidding, activity requirements, bid-switching limitations, and intra-round price point percentage bids. While the flexibility and bidding options that these metrics would afford applicants is well intentioned to

[58] *Id.* at 14231.
[59] *Id.*

facilitate auction efficiency and optimized delivery of funding, the possible benefits of this approach would likely be undermined by its considerable complexity. Adherence to the currently proposed approach is likely to discourage some potential bidders from participating, particularly smaller providers that are focused on using their capital to deploy broadband facilities to new areas rather than to pay lawyers and other outside consultants.[60] For this reason, WISPA will be looking to suggestions in the initial comments that would reduce the intricacy of the Commission's proposed auction scheme and maximize the likely number of competitive bidders. To this end, WISPA and other interested stakeholders have agreed to meet to consider ideas that could simplify and streamline the currently-proposed auction scheme.

[60] *See* ACA/NTCA/WISPA Letter at 1 ("auction design and associated proposals in the *Public Notice*, especially when taken in the aggregate, are so inordinately complex that they will deter many potential bidders from participating").

Conclusion

With the recommendations described above, the Commission can conduct a fair, technologically neutral reverse auction that ensures meaningful participation by large and small broadband providers and fidelity to its public interest obligations, without compromising the integrity of the Commission's rules or the auction itself. Through these recommendations, unserved rural Americans will benefit from robust competitive bidding that will enable broadband deployment that will help bridge the digital divide. WISPA urges the Commission to adopt and implement its recommendations.

Respectfully submitted,

WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

September 18, 2017 By: */s/ Chuck Hogg*, President
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