

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

| | | |
|---------------------------------------|---|----------------------|
| In the Matter of |) | |
| |) | |
| Connect America Fund |) | WC Docket No. 10-90 |
| |) | |
| Connect America Fund Phase II Auction |) | AU Docket No. 17-182 |
| |) | |
| |) | |

COMMENTS OF THE RURAL WIRELESS ASSOCIATION, INC.

The Rural Wireless Association, Inc. (“RWA”)¹ files these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Public Notice seeking comment regarding competitive bidding procedures and program requirements for the Connect America Fund Phase II (“CAFII”) auction (“Auction 903”).² RWA’s comments focus on the Commission’s correct choice of geographic bidding area size, and concerns regarding barriers to participation by small and rural service providers in Auction 903.

I. RWA SUPPORTS ADOPTION OF CENSUS BLOCK GROUPS OVER CENSUS TRACTS AS THE CAFII MINIMUM GEOGRAPHIC BIDDING AREA.

In the interest of providing bidders with “as much flexibility as feasible,” the Commission proposes to use census block groups containing one or more eligible census blocks

¹ RWA is a 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies who serve rural consumers and those consumers traveling to rural America. RWA’s members are small businesses serving or seeking to serve secondary, tertiary, and rural markets. RWA’s members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies. Each of RWA’s member companies serves fewer than 100,000 subscribers.

² 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*).

as the minimum geographic area for auction bidding.³ RWA agrees with this proposal and the Commission’s findings that: (1) utilizing census tracts “so as to limit the number of discrete biddable units” is unnecessary; and (2) the number of eligible census block groups will not “materially increase the complexity of the Phase II auction.”⁴ RWA appreciates Commission recognition that the use of census tracts would be “problematic for small providers that may seek to construct smaller networks or expand existing networks because a larger minimal geographic area, like a census tract...may extend beyond a bidder’s service territory, franchise area, or license area.”⁵

Simply put, census tracts are too large. Tracts just outside the urban landscape are smaller and/or have higher population than tracts in rural areas – making them more attractive to serve. Networks in these census tracts are easier to construct because the unserved areas are closer together and require less infrastructure. In very rural areas, however, census tracts are much larger, have lower population density, and are difficult to cover.⁶ Unserved areas are spread further apart, and more network infrastructure is required to provide service. If the Commission were to use census tracts, there would be a higher concentration of valuable census blocks in the tracts closer to urban areas than there would be in the more rural tracts, allowing funding to be targeted to these more populated census tracts at a lower bidding cost. In sum, use of census tracts would make it easier for large service providers to bid upon and successfully win the higher value (lower cost) areas than if they were forced to compete using a smaller bidding

³ *Public Notice* at ¶ 12.

⁴ *Id.* at ¶ 13.

⁵ *Id.*

⁶ [More About Census Blocks](#), FCC Form 477 (Mar. 2015) (Noting that census blocks are the smallest unit of geography defined by the Census Bureau, but that they are diverse in size. The largest census block is over 8,500 square miles, which is a good indication of just how large many blocks that make up a single census tract – particularly in rural areas – can be.).

area.

II. GIVEN THE COMPLEXITY OF AUCTION 903, THE COMMISSION SHOULD ADOPT FLEXIBLE ANTI-COLLUSION RULES TO FACILITATE PARTICIPATION BY SMALL AND RURAL SERVICE PROVIDERS.

The Commission has stated its expectation that the CAFII auction will “attract companies that have never before received universal service funding,” including “fixed wireless providers that can efficiently serve remote areas.”⁷ In order to assist these prospective new auction bidders, the Commission seeks comment on what types of additional information (*e.g.*, fact sheets and user guides) it could make available to help educate parties that have never participated in a Commission auction. It also seeks comment on whether the Bureaus should use the Commission’s Office of Communications Business Opportunities to engage with small providers interested in the auction process.⁸

RWA shares the Commission’s excitement regarding Auction 903 and the opportunities it could afford to rural consumers, but is concerned that the auction’s complexity, coupled with the Commission’s anti-collusion rules, may limit its members’ participation. While fact sheets, user guides, and Commission outreach are helpful, prospective bidders must be able to rely on advice from their consultants, experts, and lawyers during competitive bidding periods. The Commission should ensure that its anti-collusion rules do not preclude small and rural companies from doing so.

⁷ *Public Notice* at p. 42 (statement of Chairman Ajit Pai).

⁸ *Id.* at ¶ 71.

In preparation for the 600 MHz Incentive Auction, the Commission issued guidance regarding the application of its anti-collusion rules to communications with consultants, experts, and lawyers during competitive bidding periods.⁹ The Commission stated:

During the period the prohibition on certain communications is in effect, covered parties may want or need to communicate bids or bidding strategies to third parties such as counsel, consultants or lenders. The rule does not prohibit such communications, provided that the covered entity takes any steps necessary to prevent the third party from becoming a conduit for communicating bids or bidding strategies to other covered parties.¹⁰

The Commission stated that “[f]or third parties that may advise multiple licensees on bids or bidding strategies, such as attorneys or auction consultants, firewalls and other compliance procedures should be implemented to help prevent such third parties from becoming conduits.”¹¹ The Commission elaborated “that an individual practitioner that holds bids or bidding information of more than one covered party presents a greater risk of engaging in [a prohibited] communication.”¹² The Commission seeks comment on the appropriate measures to take in order to prevent competitive harm in Auction 903, and notes that the Wireless Telecommunications Bureau “has expressed particular concerns about [multiple applicants] employing the same individual for bidding advice.”¹³

RWA understands and shares the Commission’s desire to prevent waste, fraud and abuse of Universal Service Fund resources. At the same time, however, the Commission must be careful not to adopt restrictions that are overly broad and limit the ability of small and rural

⁹ See *Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction*, [Public Notice](#), DA 15-1129 (Oct. 5, 2015) (“*Incentive Auction Guidance*”).

¹⁰ *Id.* at ¶ 12.

¹¹ *Id.* at ¶ 13.

¹² *Id.* at ¶ 15. The Commission expressly did not find that multiple bidders’ retaining the same individual practitioner would constitute a per se violation of the prohibited communications rule, but effectively warned that parties did so at their own risk.

¹³ *Public Notice* at ¶ 21.

carriers to rely on counsel and consultants when participating in the CAFII reverse auction. The Commission should specifically permit small business participants to retain, on an individual basis, the same counsel (and, through counsel, consultants and other experts) that are retained by other bidders.

In particular, the canons of ethics applicable to attorneys already prohibit communication of confidential information about a client to other clients or entities or its use for the benefit of other clients,¹⁴ and there can be no doubt that decisions concerning bids or bidding strategies would be viewed as such confidential information.¹⁵ Rural carriers like those that comprise RWA have limited personnel resources. Small staffs already manage a substantial workload, and many lack the manpower, resources, or expertise necessary for auction participation. In past auctions, small and rural service providers have relied on their established regulatory attorneys to assist them with the auction process. Such participation by attorneys has been commonplace, and has not prompted concerns regarding abuse, bidding irregularities, or anticompetitive behavior. To the extent that consultants or other experts are needed to assist in the auction process, they should be able to be retained by the bidding entity's attorney. The attorney is duty bound to ensure that others whose services he or she utilizes do not disclose or

¹⁴ For example, members of the District of Columbia Bar are subject to [Rule 1.6\(a\)](#) which provides:

(a) Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:

- (1) reveal a confidence or secret of the lawyer's client;
- (2) use a confidence or secret of the lawyer's client to the disadvantage of the client;
- (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

¹⁵ See e.g., [Ex Parte Letter](#) to Ms. Marlene H. Dortch, Secretary, FCC, from Kathleen A. Kirby, Chair, Mass Media Practice Committee, Federal Communications Bar Association (May 14, 2015).

use the confidences or secrets of a client.¹⁶ The ramifications to attorneys for failing to adhere to the code of professional conduct include sanctions, suspension of license and ultimately disbarment. These possible outcomes for violation of the code of ethics create a much greater incentive to avoid violation of the anti-collusion rule than the sanctions envisioned by the Commission. Allowing attorneys (and the consultants they retain) to counsel multiple clients in the same auction strikes a balance between being overly restrictive and inhibiting Auction 903 participation and being overly permissive and running the risk that prohibited communications may skew Auction 903 bidding.

III. CONCLUSION

RWA appreciates the Commission's efforts to construct a technology-neutral CAFII auction that encourages the participation of small and rural service providers. RWA agrees with the Commission's proposal to use census block groups, rather than census tracts, as the minimum geographic bidding area for Auction 903. RWA encourages the Commission to specifically permit small business participants to retain, on an individual basis, the same attorneys that are retained by other bidders. Allowing these attorneys to retain the expertise of auction consultants on behalf of their clients strikes a fair balance between inhibiting Auction 903 participation and running the risk that prohibited communications may skew Auction 903 bidding. The inability to rely on a limited pool of experienced third parties could prevent many small and rural carriers from participating in Auction 93 – an unintended consequence the Commission should endeavor to avoid.

¹⁶ District of Columbia Bar Rules of Professional Conduct, Rule 1.6(f) provides: "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that such persons may reveal information permitted to be disclosed by paragraphs (c), (d), or (e)."

Respectfully submitted,

RURAL WIRELESS ASSOCIATION, INC.

By: */s/ Caressa D. Bennet*

Caressa D. Bennet, General Counsel
Erin P. Fitzgerald, Regulatory Counsel
5185 MacArthur Blvd., NW, Suite 729
Washington, DC 20016
(202) 551-0010
legal@ruralwireless.org

September 18, 2017