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

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

To: The Commission

COMMENTS OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

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Summary

The Rural Digital Opportunity Fund ("RDOF") represents a significant opportunity for the Commission to accelerate the deployment of fixed broadband to rural communities where access is lagging behind urban areas. With $20.4 billion allocated to RDOF, the Commission must ensure that its rules carefully consider how its broadband deployment objectives can be best advanced, where support should be allocated and prioritized, and when support should be awarded.

The Wireless Internet Service Providers Association ("WISPA") applauds the Commission's efforts to craft rules that will leverage the lessons learned from the Connect America Fund ("CAF") Phase II reverse auction. WISPA members were very successful in the CAF II auctions, winning more than half of the $1.488 billion in support, but at the same time many of its members elected to not participate in the auction and some face overbuilding from subsidized providers. The diversity of views within WISPA's membership balances and informs the proposals and recommendations in the accompanying Comments.

As an initial matter, the Commission should grant WISPA's petition for partial reconsideration of the 2011 *USF/ICC Transformation Order*. The definition of "unsubsidized competitor" that the Commission adopted enshrines overbuilding of broadband networks simply because the "unsubsidized competitor" does not offer voice service. Although it is too late to reverse the overbuilding resulting from applying the current definition of "unsubsidized competitor" in CAF, granting WISPA's long-pending petition will help avoid that outcome in RDOF.

WISPA generally supports the Commission's framework for auctioning RDOF support for 10-year terms, but it would be premature to finalize a budget until the Commission resolves a

number of variables that would affect eligibility of both areas and applicants. WISPA also makes a number of suggestions to the auction process and design. First, the Commission should eliminate the existing requirement that high-cost recipients must offer standalone voice service. As more and more consumers cut the cord, voice subscriptions are increasingly migrating from switched access to VoIP which, by definition, requires a broadband connection. Second, the Commission should provide incentives to bidders that commit to accelerated buildout, which will more quickly accomplish the Commission's goals. Third, the Commission should make sure that its determination of eligible "locations" is as current, accurate, and granular as possible. Ideally, the Commission will have adopted the "broadband-serviceable location fabric" to reach this goal, which would also minimize challenges over whether an area is "served" or "unserved."

The Commission should not, however, adopt any additional performance metrics. There is no evidence that certain spectrum-based recipients would forego receiving recurring revenue from new subscribers with plans that require more capacity. Further, the Commission should not impose subscription requirements on RDOF recipients. This proposal runs afoul of the Commission's statutory mandate to ensure that support is used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." Converting the RDOF program from the deployment program authorized by Congress to an adoption program would make RDOF recipients responsible for demand, something that cannot be accurately predicted over a six-year buildout term. There can be little doubt that this proposal will have a significant chilling effect on RDOF auction participation, and those that do participate would likely "play it safe" and bid at lower speeds.

The Commission should prioritize support to those areas that lack 10/1 Mbps service. To the extent the "fabric" is not complete and the portal contemplated by the Digital Opportunity

Data Collection proceeding also is not established, the Commission should consider sequential auction events. The Commission should use the challenge process to determine the final list of eligible areas. Thought time consuming from an administrative standpoint, the Commission must rely on challenges in the absence of more current, accurate, and granular data.

The Commission also should afford applicants flexibility with their post-auction financial obligations. The Commission should allow performance bonds as an alternative to letters of credit. With appropriate conditions and requirements, performance bonds can provide the Commission with a similar measure of protection in the event of a default on buildout, at a fraction of the cost to RDOF recipients who can apply the money to buildout instead of bank fees. The Commission also should reduce the value of letters of credit over time as buildout milestones are met to a greater degree than it permits for CAF Phase II.

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The Wireless Internet Service Providers Association ("WISPA") hereby submits its initial Comments in response to the Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.[1]

In the *NPRM*, the Commission seeks comment on proposed rules for the Rural Digital Opportunity Fund ("RDOF"), a $20.4 billion program intended to provide financial support for rural areas that lack access to adequate fixed broadband service. As described in detail below, WISPA supports the overall framework for RDOF, including the proposal to allocate support based on the Connect America Fund ("CAF") Phase II reverse auction process, adopt performance requirements, and establish enforcement mechanisms. Given ongoing progress on broadband mapping and data collection improvements, the Commission should prioritize funding areas that are most in need of support and conduct subsequent auctions as data becomes more accurate and reliable to further minimize the possibility of subsidized overbuilding of unsubsidized areas. As a predicate to finalizing its list of RDOF-eligible areas, the Commission

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[1] *Rural Digital Opportunity Fund; Connect America Fund*, WC Docket Nos. 19-126 and 10-90 (rel. Aug. 2, 2019) ("*NPRM*"). The *NPRM* was published in the Federal Register on August 21, 2019. *See* 84 Fed. Reg. 43543 (Aug. 21, 2019).

should first grant WISPA's petition for reconsideration of the *2011 USF/ICC Transformation Order*.[2]

WISPA strongly opposes the addition of subscription levels as a new performance metric that, if not met, would potentially result in a loss of RDOF support. WISPA also recommends changes to the weights proposed for performance tiers and favors alternatives to using letters of credit as the sole basis on which the Commission can ensure that its support is recoverable in the event of an RDOF recipient fails to meet a buildout milestone and timely cure that deficiency.

Introduction

WISPA is a trade organization that represents the interests of the fixed wireless broadband industry. Its members include more than 500 small wireless Internet service providers ("WISPs") that leverage cost-effective fixed wireless equipment and technology to provide service to communities where wireline options are not available, are too costly to deploy, or where consumers lack choice. WISPs rely on a variety of unlicensed, lightly licensed (licensed by rule) and licensed spectrum to deliver services and, increasingly, some WISPs are adding fiber optics where the business model can support its much higher cost.

WISPA was an active participant in the proceedings that established CAF and, in particular, those that resulted in the CAF Phase II reverse auction. Among other issues, WISPA advocated for rules allowing more banks to be eligible to issue letters of credit, permitting auction winners to submit audited financial statements post-auction, and requiring only auction winners to become eligible telecommunications carriers ("ETCs"). WISPA members were very successful in the auction, winning more than half of the support for more than 300,000 eligible locations. Providers proposing to use fixed wireless technology, in some cases in conjunction

[2] *See Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) ("*USF/ICC Transformation Order*").

with fiber, won about 65 percent of the support to serve about 53 percent of the 700,000 locations.[3] Based on this success, continuing interest from among WISPA's membership, and the availability of significantly more support dollars, WISPA strongly believes that its members will be active bidders in the RDOF auction process.

As the *NPRM* proclaims, "[c]losing the digital divide and bringing robust, affordable broadband to all Americans is the Commission's top priority. By improving access to modern communications services, we can help provide individuals living in rural America with the same opportunities as their urban counterparts."[4] While the CAF process is proving to be successful in achieving the Commission's objectives, Chairman Pai rightfully acknowledged that the RDOF can offer deployment benefits "on an even greater scale. . . . we're proposing to connect more Americans to faster broadband networks than any other universal service program has done."[5] Commissioner O'Rielly noted that broadband can be provided on a technology-neutral basis: "our job is to get broadband to all Americans, regardless of technology."[6] Commissioner Carr referred to the adoption of the *NPRM* as "more good news in our efforts to close the digital divide – to ensure that every American can access next-generation broadband, regardless of where they live."[7] Commissioner Rosenworcel stated that "I believe the future belongs to the connected. No matter who you are or where you live, you need modern communications to have a fair shot at 21st century success."[8] And Commissioner Starks stated that "[t]he vitality and very

[3] *See* Testimony of Carol Mattey, Mattey Consulting, LLC, Before the Subcommittee on Communications, Technology, Innovation and the Internet of the Committee on Commerce, Science and Transportation, U.S. Senate, on "The Impact on Broadband Investments in Rural America" (March 12, 2019) ("Mattey Senate Testimony") at 3.
[4] *NPRM* at 5, ¶ 12.
[5] *Id.*, Statement of Chairman Ajit Pai ("Pai Statement").
[6] *Id.*, Statement of Commissioner Michael O'Rielly.
[7] *Id.*, Statement of Commissioner Brendan Carr.
[8] *Id.*, Statement of Commissioner Jessica Rosenworcel.

existence of communities is threatened when there are no affordable, quality broadband connections available."[9]

Many of the Commission's proposals for RDOF build on the successful model the Commission employed for CAF Phase II. In large part, the Commission should adopt these proposals, but there are a few, important aspects that mandate change. *How* the Commission achieves its "top priority" – one recognized by each Commissioner – is of utmost importance. First, the amount budgeted for RDOF support will dwarf the $5 billion budget for CAF Phase II overall and the $1.488 billion allocated through the auction process. Second, simultaneous with the adoption of the *NPRM*, the Commission also adopted a Second Further Notice of Proposed Rulemaking in the *Digital Opportunity Data Collection* proceeding.[10] The anticipated availability of a broadband serviceable location "fabric," and the definition of "location" itself, are important considerations in determining *where* support should be allocated and where it should not. Third, the Commission must understand that *when* the auction (or sequential auction events) occurs will have a substantial impact on auction participation, as will its eligibility criteria and performance requirements. While there should be little opposition to implementing RDOF, it is critical that the Commission correctly answer the questions of how, where and when the process should occur.

Based on its experience in the CAF II rulemaking process and its members' participation in the auction planning, bidding, and post-auction processes, WISPA has a deep background that informs its positions in this proceeding to help guide the Commission's decisions. WISPA's

[9] *Id.*, Statement of Commissioner Geoffrey Starks.
[10] *Establishing the Digital Opportunity Data Collection, et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, WC Docket Nos. 19-195 and 11-10 (rel. Aug. 6, 2019) ("*DODC FNPRM*"). WISPA plans to participate in that proceeding as well.

comments also are informed by its members that elected to not participate in the CAF Phase II process and those that have been subject to subsidized overbuilding of their broadband networks.

Discussion

I. THE COMMISSION SHOULD GRANT WISPA'S PENDING PETITION FOR RECONSIDERATION BEFORE ADOPTING RULES IN THIS PROCEEDING

On December 29, 2011, WISPA filed a petition for partial reconsideration of the *USF/ICC Transformation Order*.[11] The WISPA Petition seeks modification of the definition of "unsubsidized competitor" in Section 54.5 of the Commission's Rules, so that the rule considers whether unsubsidized voice and broadband services are available in a given area, not whether the same entity must provide both unsubsidized voice and broadband services. WISPA explained that, "for fixed broadband providers serving areas where voice services are already provided by existing telecommunications carriers, the current 'unsubsidized competitor' definition creates the near certainty that CAF subsidies will be extended to these existing carriers that will then become direct competitors with existing unsubsidized fixed broadband providers."[12] In other words, the existing definition adopted in 2011 essentially legitimizes overbuilding of broadband services by allocating support where an existing provider already is meeting the broadband speed threshold required for an area to be deemed "served" but has chosen not to offer voice because others in the market are providing that service or there simply is no business case to be made for offering voice.

As Dr. Mark A. Jamison told the United States Senate in March of 2019,

> It is normal in competitive markets for rivals to duplicate each other's infrastructure. This duplication is important for rivals to be able to compete for customers and for companies to test alternative services for the future. This

[11] Petition for Partial Reconsideration of the Wireless Internet Service Providers Association, WC Docket No. 10-90, et al. (filed Dec. 29, 2011) ("WISPA Petition").
[12] *Id.* at 6.

> duplication of infrastructure can be wasteful at best, and perhaps even be destructive, when the government is subsidizing one of the providers.[13]

That is precisely what has occurred in some areas of the country. As another witness, Justin Forde of WISPA member Midco explained,

> In the past, some government broadband programs have allowed funding to be used in places that already have broadband service. Midco has been overbuilt with our own tax dollars in places like Mitchell and Yankton, South Dakota, as have others in our region. In Yankton, South Dakota, for example, government dollars were used by a fiber company to overbuild two existing providers; and the new provider used those government funds to 'cherry pick' a few business customers.[14]

Some unsubsidized WISPA members that have expended private, at-risk capital to deploy standalone broadband service have seen CAF Phase II recipients – in some cases other WISPA members, but also price cap carriers and others – enter the marketplace and provide subsidized competition to them, even where voice service is ubiquitous but provided by another company. These existing providers, identifiable at the census block level by comparing Form 477 data and CAF auction results, of course assumed the risk that not offering voice could expose them to subsidized broadband competition. But that does not need to be the case in RDOF. In fact, given the increased speed threshold that will make many more areas eligible for RDOF support, the problem will only be exacerbated.

The harms stemming from Section 54.5 may have been theoretical in 2011, but the results of the CAF Phase II process have confirmed WISPA's concerns. While it is too late for the

[13] *See* Testimony of Mark A. Jamison, Ph.D., Before the Subcommittee on Communications, Technology, Innovation and the Internet of the Committee on Commerce, Science and Transportation, U.S. Senate, on "The Impact on Broadband Investments in Rural America" (March 12, 2019) ("Jamison Senate Testimony") at 5.

[14] *See* Testimony of Justin Forde, Senior Director of Government Relations, Midcontinent Communications, Before the Subcommittee on Communications, Technology, Innovation and the Internet of the Committee on Commerce, Science and Transportation, U.S. Senate, on "The Impact on Broadband Investments in Rural America" (March 12, 2019) at 10.

Commission to rectify the anti-competitive harms from CAF Phase II subsidized overbuilding, the Commission should grant the WISPA Petition before it adopts rules for RDOF as a measure that will help avoid the recurrence of subsidized overbuilding. The Commission can analyze Form 477 to identify the areas where a broadband provider offers at least 25/3 Mbps service but does not offer voice, determine whether the broadband provider is "unsubsidized," consider if voice service is already offered in the area, and narrow the list of areas eligible for RDOF support. That outcome would also make more RDOF support available in areas that truly lack broadband.

II. THE COMMISSION SHOULD ALLOCATE SUPPORT FOR A TEN-YEAR SUPPORT TERM PURSUANT TO A REVERSE AUCTION

A. The Commission Should Adopt A 10-Year Support Term

The Commission proposes a 10-year support term, the same support term it adopted for recipients of CAF Phase II support awarded via auction.[15] Based on input it has obtained from its CAF Phase II auction winner members, WISPA agrees that 10 years is an appropriate term that promotes long-term investment and auction participation.[16]

B. The Budget Cannot Be Established Until Other Decisions Are Made

The Commission proposes a $20.4 billion budget for RDOF, $16 billion of which would be allocated in Phase I and $4.4 billion of which would be allocated in Phase II.[17] WISPA believes, however, that simply extrapolating the amount that price cap carriers received in CAF Phase II ignores the fact that the cost to deploy 10/1 Mbps service – in many cases involving the installation of wireline plant or fixed wireless infrastructure for the first time in the area – will be less than the cost to deploy 25/3 Mbps or higher service. In other words, CAF Phase II model-

[15] *NPRM* at 6, ¶ 15.
[16] *Id.*
[17] *Id.* at 6-7, ¶¶ 16-17.

based support will often be used to deploy higher-cost initial service whereas a large portion of RDOF Phase I would be used to upgrade price cap carriers' existing service at lower cost. As such, the proposed budget may overstate the amount of support necessary because the simple extrapolation does not consider incremental costs, something the Commission's analysis does not disclose.

Other concerns affecting the budget are the auction rules, auction design, and auction timing. If the Commission requires RDOF recipients to meet subscribership benchmarks, participation in the auction may be significantly depressed. If the Commission adopts more stringent eligibility requirements, that, too, would sideline many prospective bidders. Reducing competition in the auction would tend to increase the per-location cost to the budget. Conversely, if the Commission permits performance bonds as an alternative to letters of credit, as recommended *infra*, auction participation would be more robust, which would tend to lower the level of per-location support. The budget also would be affected by the resolution of the WISPA Petition, the timing of the auction, the use of current Form 477 data, and the outcome of challenges. Generally, the more time broadband providers have to upgrade their networks to 25/3 Mbps or faster or to add voice service without federal support, the fewer areas will require to be supported through RDOF.

In sum, there are a large number of variables that could affect the RDOF budget. The Commission should therefore defer establishing a budget until it finalizes its rules, and should reassess its budget after Phase I.[18]

[18] *Id.* at 7, ¶ 18.

C. The Commission Should Allocate Support Pursuant To A Reverse Auction Process

WISPA strongly supports the Commission's proposal to allocate RDOF support via a reverse auction, or series of reverse auction events, modeled on the CAF Phase II auction rules. The Commission should retain the same basic nationwide, multiple-round, descending clock auction design,[19] which efficiently allocated support to more than 700,000 unserved CAF Phase II locations. There is no reason for the Commission to depart from its proposal which, "[s]imply put, . . . produced higher-speed broadband and lower costs. That's a killer combination that we want to replicate."[20]

The Commission asks for comment on the size of the geographic areas made available via auction, observing that there will be many more areas available for RDOF support.[21] The Commission's use of census block groups to limit the number of auction lots in CAF Phase II accomplished that objective. To the extent that there will be more census block groups in RDOF does not necessitate a change in this geographic bidding unit because applicants will most likely focus their bids on discrete, manageable geographic areas. WISPA therefore supports retaining census block groups as the geographic units for the RDOF auction.

III. THE COMMISSION SHOULD ADJUST ITS PROPOSED PERFORMANCE REQUIREMENTS AND SHOULD NOT IMPOSE SUBSCRIBERSHIP OBLIGATIONS ON RECIPIENTS

The Commission proposes to adopt the framework it used for the CAF Phase II auction, with a few significant changes. WISPA supports the overall approach, but recommends modifying the weights for the performance tiers to better align with the broadband packages that consumers actually purchase. The Commission should not in any way require RDOF recipients

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[19] *Id.* at 7-8, ¶¶ 19-20.
[20] Pai Statement.
[21] *NPRM* at 8, ¶ 21.

to meet subscribership benchmarks. By statute, the Commission's mandate is to use high-cost support to fund "access," meaning deployment, not adoption.[22] Indeed, the Communications Act of 1934, as amended (the "Act"), specifies that any support recipient can only use its support "for the provision, maintenance, and upgrading of facilities and services for which the support is intended," not to fund adoption programs.[23] There are a number of external factors beyond the control of a broadband provider – subsidized or not – that greatly affect broadband adoption, and subscription performance will have a significant deterrent effect on auction participation and service to eligible locations.

A. The Commission Should Modify Its Proposed Performance Tiers

As an initial matter, WISPA agrees that there is no reasonable basis for the Commission to allocate support for 10/1 Mbps broadband service.[24] Not only is the Commission correct that "access to 25/3 Mbps broadband service is not a luxury in urban areas,"[25] but the extremely low percentage of support awarded for 10/1 Mbps service in the CAF Phase II auction demonstrates that bidders were willing to deploy supported service at much faster speeds.[26]

WISPA also agrees that RDOF recipients should be required to offer broadband and voice at service at rates that are "reasonably comparable" to rates offered in urban areas.[27] However, WISPA believes that RDOF recipients should not be required to offer standalone voice service.[28] As a practical matter, there are few if any consumers that lack access to voice

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[22] 47 U.S.C. § 254(b)(1) (policies for the preservation and advancement of universal service shall be based, in part, on "access" provided in "all regions of the Nation and providing "access" in rural and high-cost areas).
[23] 47 U.S.C. § 254(e).
[24] *NPRM* at 9, ¶ 24.
[25] *Id.*, *citing Connect America Fund, et al.*, 33 FCC Rcd 11893, 11894 ¶ 3 (2018).
[26] *See* News Release, "*Connect America Fund Auction to Expand Broadband Service to Over 700,000 Rural Homes and Businesses*" (Aug. 28, 2018) ("Auction Closing News Release") (stating that only 0.25% of support was for 10/1 Mbps service).
[27] *NPRM* at 9, ¶ 23.
[28] *Id.*

capability, either through an existing carrier, interconnected VoIP or an over-the-top VoIP application such as Ooma. The Commission recognized this in the *USF/ICC Transformation Order* where, "to promote technological neutrality while ensuring that our new approach does not result in lower quality offerings, we amend section 54.101 of the Commission rules to specify that the *functionalities of eligible voice telephony services include voice grade access to the public switched network or its functional equivalent*."[29] In addition, the Commission has held (and courts have upheld) the ability of a service provider to offer a common carrier (i.e., telecommunications) service if it holds itself out indiscriminately to serve a particular class of users with that service – including standalone broadband service.[30] And, the Commission's own data shows that, over a three-year period ending in December 2017, interconnected VoIP subscriptions increased at a compound annual growth rate of 7 percent while switched access lines declined at a compound annual growth rate of 12 percent per year.[31] This shows that, increasingly, consumers are subscribing to voice service as a component of their broadband connections, and "cutting the cord" on switched access lines that do not require an internet connection. Thus, so long as voice is offered along with broadband service and the voice service meets the functional "voice-grade" requirements of Section 54.101, the statutory obligation will have been satisfied.

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[29] *USF/ICC Transformation Order* at 17692 (citations and footnotes omitted) (emphases added). Section 54.101(a)(1) states that "[e]ligible voice telephony services must provide voice grade access to the public switched telephone network or its functional equivalent."
[30] *See Federal-State Joint Bd. On Universal Service*, 16 FCC Rcd 571, 573-74, (2000), *aff'd sub nom. U.S.Telecom Ass'n v. FCC*, 295 F.3d 1326, 1332-33 (D.C. Cir. 2002); *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630,641 (D.C. Cir. 1976).
[31] FCC, Wireline Competition Bureau, Industry Analysis and Technology Div., *Voice Telephone Services: Status as of December, 2017* (2019) at 2.

The bidding tiers should, as was the case with the CAF Phase II auction, be performance-based and technology neutral.[32] As proposed, the tiers should allow bidders to select from among Baseline (25/3 Mbps), Above Baseline (100/20 Mbps) and Gigabit (1 Gbps/500 Mbps) performance tiers with the monthly minimum data allowances paired with low (100 ms) and high (750 ms) latency standards.[33]

WISPA believes the Commission should, however, adjust the weights it proposes to apply to the three speed/data usage tiers. In CAF Phase II, the spread between the best and least tiers was 90 points. While that may have been appropriate for an auction with four speed/data usage tiers, it is not well suited for an auction with three performance tiers. Given that the Commission does not propose to include a Minimum 10/1 Mbps tier, it would be reasonable to simply eliminate that tier and retain the weights for the remaining tiers. The table below depicts WISPA's proposal:

Performance Tier	Speed	Monthly Usage Allowance	Weight
Baseline	≥ 25/3 Mbps	≥ 150 GB or U.S. median, whichever is higher	45
Above Baseline	≥ 100/20 Mbps	≥ 2 TB or U.S. median, whichever is higher	15
Gigabit	≥ 1 Gbps/500 Mbps	≥ 2 TB or U.S. median, whichever is higher	0

This proposal narrows the gaps between the Above Baseline and Gigabit tiers from 25 to 15 and between the Baseline and Gigabit tiers from 50 to 45. Although WISPA does not object to the formulation of the usage allowance, it may require substantial additional investment and time to

[32] *NPRM* at 8-9, ¶ 23.
[33] *Id.* WISPA takes no position at this time on the weight to be applied to high latency.

comply with the uncertain evolution of the median.[34] To address the situation where the median (or average) exceeds the benchmark, the Commission should afford RDOF recipients a reasonable period of time to upgrade their networks. The additional time stemming from increasing data usage beyond the control of RDOF recipients should not be counted against the relevant buildout milestone or be subject to enforcement.

Adopting this proposal would be consistent with Congressional intent. The language of Section 254(c) of the Act correctly acknowledges that "[u]niversal service is an evolving level of telecommunications services," but requires the Commission to

> consider the extent to which such telecommunications services (A) are essential to education, public health, or public safety; (B) *have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers*; (C) are being deployed in public telecommunications networks by telecommunications carriers; and (D) are consistent with the public interest, convenience, and necessity.[35]

Adopting a narrower spread between the Above Baseline and Gigabit is justified by the Commission's own data showing that "a substantial majority of residential customers" are not subscribing to gigabit services. The *2019 Broadband Deployment Report* shows that, as of December 31, 2017, more than 75 percent of broadband customers in the lowest population density quartile subscribed to broadband service of 25/3 Mbps or less and five percent subscribed to 250/25 Mbps service (presumably this includes a lesser percentage of those that subscribe to packages with gigabit download speeds).[36] The data is similar with respect to the lowest quartile

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[34] WISPA notes that for each performance tier the Commission is proposing a monthly usage allowance that may increase over time (e.g., ≥ 2 TB or U.S. median, whichever is higher). *See NPRM* at 8-9, ¶ 23. In the CAF II auction, possible usage allowance increases as a result of increases in the U.S. median were limited to the baseline tier of 25/3 Mbps. *See Connect America Fund*, *et al.*, Report and Order and Order on Reconsideration, 32 FCC Rcd 1624, 1628 ¶ 17 (2017).

[35] 47 U.S.C. § 254(c)(1) (emphasis added).

[36] *2019 Broadband Deployment Report*, GN Docket No. 18-238 (rel. May 29, 2019) at 30, Fig. 13.

for median household income, county poverty rate and rural population rate.[37] Further, although it is not a reflection of broadband subscribership, 19 percent of the locations covered by CAF Phase II auction winners accepted support to provide 1 Gbps/500 Mbps service.[38] That may be a significant minority, but it is not a "substantial majority" under the Act.

The Commission should adopt the adjustments to the performance tiers WISPA recommends to better represent actual consumer subscription.

B. The Commission Should Grant Bidding Credits Or Other Financial Incentives For Accelerated Buildout

WISPA supports the Commission's proposed service milestones, which are identical to the milestones for CAF Phase II.[39] The Commission also should measure compliance at the state level rather than at the individual geographic level to streamline compliance and to make it easier for states to review and certify compliance to the Commission.[40] Recipients should have the flexibility to deploy service to 95 percent of locations in the state without suffering any reduction in support.[41] The Commission adopted these same rules for CAF Phase II auction recipients and, while the impact cannot be fully assessed at this time, at this early stage the rules appear to be working well.[42]

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[37] *Id.*
[38] *See* Auction Closing News Release.
[39] *NPRM* at 10, ¶ 28.
[40] *Id.* at 11, ¶ 28.
[41] *Id.* at 11, ¶ 29.
[42] CAF recipients are just beginning to build out their supported areas. Also, the Commission has not adopted procedures for resolving "locations" discrepancies and it is not known, at the census block level, whether and to what extent the Commission's estimate of unserved locations is accurate. *See id.* at 11, ¶ 30. The Broadband Mapping Coalition ("Coalition"), of which WISPA is a member, recently submitted results of a mapping pilot program to the Commission. The pilot program revealed significant discrepancies in the number and physical location of "locations" estimated by the Commission's model and the actual number and physical location determined through the location "fabric" process that uses several datasets to achieve a much higher confidence in the actual number and physical location of "locations." *See* Letter from Jonathan Spalter, et al., to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 19-195, 11-10, 10-90 and 19-126 (filed Aug. 20, 2019) ("Coalition Pilot Results Letter").

In addition, the Commission should provide some incentive for those winning bidders that commit to accelerated buildout. Such incentive can be applied in three different ways. First, the Commission could award a bidding credit to a bidder that agrees to accelerated buildout. This alternative would be more attractive to bidders that do not plan to bid for a large number of geographic units and would be reasonably constrained by enforcement penalties for failing to meet the accelerated schedule. As a bidding credit, this alternative would have no impact on the Commission's overall RDOF budget.

Second, the Commission could accelerate support payments to those recipients that deploy service more rapidly. As the Commission did in the rural broadband experiment program, it could frontload support to help fund faster buildout.[43] This alternative would not impact auction weights, but would provide more early-term support to accelerate buildout. While this alternative would have a short-term impact on the RDOF budget, the overall budgetary impact would be neutral – the same amount of support would be disbursed, but with more disbursed in the early years of the support term.

Third, in addition to the changes proposed in Section V, *infra*, the Commission could adopt greater reductions in the value of letters of credit for applicants that commit to building out on an accelerated timeframe. For example, the Commission could reduce letter of credit values by an additional 10 percent for each year that the RDOF recipient exceeds the buildout milestones.

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[43] *See Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90 and 14-58, 29 FCC Rcd 8769, 8794 ¶ 75 (2014) ("*Rural Broadband Experiments Order*") (allowing bidders to have the option to obtain 30 percent of the support at the time funding is authorized based on commitment to deploy to 85 percent of locations in three years as "an additional incentive for parties to build out there projects quickly").

To the extent the Commission is unwilling to adopt any of these proposals across the board, it should apply at least one of them to areas that are reported to have no broadband service whatsoever. In this way, the incentive would encourage faster buildout to areas where the need is the greatest. This approach would have no impact on the budget but would, however, increase auction design complexity if it were necessary to identify these areas prior to the RDOF auction.

WISPA recognizes that the Commission did not agree to incentivizing accelerated buildout with respect to CAF Phase II, other than by reducing the maximum value of letters of credit if buildout is completed before the end of year six.[44] However, with the Commission proposing to make significantly more funding available for a much larger number of unserved locations, the Commission should reassess its prior decision, for the benefit of consumers that would gain access to broadband on a more expeditious basis.

C. The Commission Should Ensure That Its Estimate of Eligible "Locations" Is As Accurate And Granular As Possible

It is of utmost importance for the Commission to rely on the most accurate, granular, and current information it has before it establishes the areas eligible for RDOF support. In the parallel *Digital Opportunity Data Collection* proceeding,[45] the Commission tasked USAC, under the direction of Commission bureaus and offices, with designing a portal for submission of polygons depicting areas where broadband providers offer service or can do so within 10 business days. At the same time, it is considering public comments on how those polygons should be determined.[46] It is not known at this time when the rules will be established, when

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[44] *See Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90, 14-58 and 14-259, 31 FCC Rcd 5949, 5967 ¶ 50 (2016) ("*CAF Phase II Auction Order*").
[45] *See Digital Opportunity Data Collection,* Report and Order and Second Further Notice of Proposed Rulemaking, WC Docket Nos. 19-195 and 10-90, FCC 19-79 (rel. Aug. 6, 2019) ("*DODC Report and Order*" and "*DODC FNPRM*").
[46] *DODC FNPRM* at 33-34, ¶ 79-80.

they will be effective and what standards broadband providers will be required to meet. The timing also must account for a challenge process – which will be more taxing without the "fabric" – and Paperwork Reduction Act ("PRA") approval. In short, it will be extremely difficult for the Commission to conduct a $16.4 billion Phase I auction in 2020, as Chairman Pai has suggested.[47]

The Commission also has proposed to adopt the Coalition's "broadband-serviceable location fabric" process.[48] In the *DODC FNPRM*, the Commission proposes "to create and integrate a broadband-serviceable location tool into the Digital Opportunity Data Collection"[49] and has recognized that the Coalition's pilot program that conceived and tested a broadband-serviceable location fabric "represents a concrete effort to identify the issues facing USAC in moving to a location-based collection."[50] The time it will take to develop the fabric is estimated to be 12-15 months from the date of procurement.[51]

In an ideal environment, the fabric would be the mapping tool on which the Commission would rely to set the number of "locations" in a census block (or other geographic area) and to determine the physical location of the "locations" within that area. WISPA appreciates the tension inherent in moving ahead quickly to make support available and the need to ensure that support is applied to unserved areas and not to areas that already have eligible service. With the pilot program finding that 23 percent of "locations" are misassigned to the wrong census block, the potential for subsidized overbuilding is a real concern.[52]

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[47] *See* Pai Statement. *See also* Mattey Senate Testimony at 5 ("I am personally acquainted from my tenure at the FCC with the difficulties of conducting a challenge process to determine the specific geographic areas eligible for Connect America Fund support. There must be a better way to do this.")
[48] *DODC FNPRM* at 42, ¶ 101.
[49] *Id.*
[50] *Id.* at 42, ¶ 100.
[51] *See* Coalition Pilot Results Letter, Attachment, Slide 13.
[52] *See id.* at Attachment, Slide 7.

The Commission proposes to allow RDOF recipients to have the opportunity to demonstrate, *after the auction*, that the number of locations identified prior to the auction is incorrect.[53] WISPA does not believe that this is the best approach. First, the location discrepancy process would necessarily be limited to the number of locations in an eligible census block, not the actual physical location of the supported locations. As CAF Phase II auction winners plan for buildout, they are finding that the physical location of a structure is as important as the number of locations. Second, the fabric will determine with much greater confidence how many and where the serviceable locations are and, if in place before Phase I commences, will obviate the need for post-auction reconciliation. Third, the definition of what constitutes a "location" is undergoing scrutiny in at least four separate contexts – the CAF Phase II auction,[54] the Alternative-Connect America Model Public Notice,[55] a request for declaratory ruling filed by Iowa rate-of-return carriers,[56] and the *DODC FNPRM*.[57] A better result would be for the Commission to resolve these issues before the RDOF auction begins. Until there is a clear and common understanding of what a "location" is, any post-auction discrepancy resolution process places bidders at a disadvantage and will lead to debates over what is a "location" and what is not – gray areas that Commission staff must resolve.

[53] *See NPRM* at 11, ¶ 30.
[54] Public Notice, *Wireline Competition Bureau Seeks Comment on Procedures to Identify and Resolve Discrepancies in Eligible Census Blocks Within Winning Bid Areas*, WC Docket No. 10-90, 33 FCC Rcd 8620 (WCB 2018).
[55] Public Notice, *Wireline Competition Bureau Issues Corrected Alternative Connect America Model II Offers to 37 Companies, Extends the Election Deadline, and Seeks Comment on Location Adjustment Procedures*, WC Docket No. 10-90, DA 19-504 (rel. June 5, 2019).
[56] *See* Petition for Clarification or Declaratory Ruling filed by Northeast Iowa Telephone Company and Western Iowa Telephone Association, WC Docket No. 10-90 (filed May 6, 2019).
[57] *DODC FNPRM* at 101-103.

D. The Commission Should Adopt Its Proposed Reporting Requirements And Reporting Measures

WISPA does not object to the Commission's proposal to require RDOF recipients to submit the same reports that CAF Phase II auction recipients must file.[58] However, to ease the burden on RDOF recipients and Commission and USAC staff, WISPA suggests that RDOF recipients be given the option to submit their location information in the HUBB by either the deadline specified in Section 54.316[59] or by the July 1 deadline for the annual report as specified in Section 54.313.[60] Some RDOF recipients may prefer to have separate reporting cycles while other may choose to consolidate reporting based on their staffing resources and other administrative requirements and business obligations. The Commission therefore should allow optionality in the timing of location reporting. Likewise, there is no reason at this time for the Commission to adopt different non-compliance measures for RDOF recipients that do not meet their buildout milestones in a timely manner.[61]

E. The Commission Should Not Adopt Additional Performance Metrics

The Commission seeks comment on whether it should adopt two additional performance requirements intended to address theoretical concerns about "better incentives" for support recipients to deploy service.[62] Both of these ideas should be rejected. The Commission's high-cost funds have always supported *deployment*, not *adoption*.[63] Converting RDOF into an adoption program will have serious negative ramifications for auction participation and broadband deployment.

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[58] *NPRM* at 12-13, ¶¶ 32-34.
[59] 47 C.F.R. § 54.316.
[60] *NPRM* at 13, ¶ 35.
[61] *Id.* at 13-14, ¶¶ 36-38.
[62] *Id.* at 14, ¶ 40.
[63] 47 U.S.C. § 254(d).

1. <u>The Commission Should Not Impose Special Obligations On Applicants Proposing To Rely On Spectrum</u>

The Commission expresses concern that "spectrum-based bidders may have capacity constraints on their systems deterring them from continuing to pursue new subscribers should an increase in capacity (but not coverage, which is mandated by the deployment milestones) require additional capital expenditures."[64] WISPA respectfully disagrees with this unsupported assertion. First, there is no data in the record, or in any other source of which WISPA is aware, that supports the underlying possibility that "[s]pectrum-based providers that do not have a network sufficient to serve most locations in a geographic area would also have an incentive to limit subscription if expanding capacity would be less profitable than limiting subscription and collecting Rural Digital Opportunity Fund subsidies based purely on deployment."[65] This implies a false, binary choice that certain spectrum-based recipients – and *only* spectrum-based recipients – would forego receiving recurring revenue from new subscribers with plans that require more capacity. The Commission should not depart from its established principle of conducting high-cost support auctions in a technology-neutral manner based on such unsupported assertions.

Second, the Commission has not explained why its existing requirement that applicants assume a 70 percent subscription rate is inadequate to address the perceived problem, which may not even exist, or why a higher percentage might be warranted.[66] In CAF Phase II, Commission

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[64] *Id.* at 14-15, ¶ 40.
[65] *Id.* at 15, ¶ 40.
[66] *See* Public Notice, "*Connect America Fund Phase II Auction Scheduled for July 24, 2018; Notice and Filing Requirements and Other Procedures for Auction 903*," AU Docket No. 17-182 and WC Docket No. 10-90, 33 FCC Rcd 1428, 1459 ¶ 80 (2018) ("*CAF Phase II Auction Public Notice*") ("we will require an applicant to assume that it will have at least a 70 percent subscription rate for its voice and broadband services by the time it will meet the final service milestone if it becomes authorized to receive support.").

staff fully vets all long-form proposals to determine compliance with Commission rules, and would not knowingly authorize funding for those applicants, regardless of technology, that fall short of meeting any material requirement, including the requirement that "[r]egardless of the assumptions an applicant makes about its subscription rate when engineering its network, the applicant must keep in mind that its network must be capable of scaling to meet demand."[67] Third, the Act requires high-cost recipients to advertise their service availability in the supported area.[68] There is no evidence that CAF recipients are not complying with this statutory requirement or that compliance is exposing deficiencies in broadband deployment. Accordingly, there is no basis for the Commission to impose a new performance requirement on spectrum-based recipients.

2. <u>The Commission Should Not Require RDOF Recipients To Meet Subscription Milestones</u>

Likewise, WISPA strongly opposes requiring RDOF recipients to meet subscribership milestones as a condition to receiving RDOF support.[69] If adopted, this proposal would effectively make RDOF recipients responsible for broadband *adoption*, a seismic shift in the *deployment* objectives of the Commission's high-cost programs. This proposal has serious statutory, policy and practical problems, and should be rejected.

First, it is important to remember that the Universal Service Fund ("USF") was established to subsidize availability of telecommunications services in high-cost areas. Pursuant to Section 254(d) of the Act, "[a] carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is

[67] *Id.*
[68] *See* 47 U.S.C. § 214(e)(1)(B).
[69] *NPRM* at 15, ¶¶ 41-42. The *NPRM* suggests that this idea stems from "a proposal," but does not cite the source of the proposal. *Id.* at 15, ¶ 41.

intended. Any such support should be explicit and sufficient to achieve the purposes of this section"[70] In the 2011 *USF/ICC Transformation Order*, the Commission articulated the goals of its universal service reforms.[71] These five objectives are:

> (1) preserve and advance universal *availability* of voice service; (2) ensure universal *availability* of modern networks capable of providing voice and broadband service to homes, businesses, and community anchor institutions; (3) ensure universal *availability* of modern networks capable of providing advanced mobile voice and broadband service; (4) ensure that rates for broadband services and rates for voice services are reasonably comparable in all regions of the nation; and (5) minimize the universal service contribution burden on consumers and businesses.[72]

Nowhere in the Act does Congress identify broadband adoption as a statutory element, and nowhere in the seminal *USF/ICC Transformation Order* does the Commission identify broadband adoption as a policy objective for the high-cost programs. To now require broadband adoption as a condition would be outside the scope of the statutory objectives of USF.

Second, even assuming the inclusion of broadband adoption were legally permissible, RDOF recipients cannot assume responsibility for a consumer's choice to not subscribe to broadband. It is one thing for RDOF recipients to meet supply obligations, quite another for them to assess and accept legal responsibility for consumer demand for broadband, let alone a particular combination of speed, data usage, and latency in various communities. While bidders will of course make projections on subscription rates before bidding in a particular area, projections are just that – estimates based on market research that ultimately may or may not turn out to be accurate. Legal responsibility, including the potential loss of support, should not be predicated on market assessments of consumer demand.

[70] 47 U.S.C. § 254(d).
[71] *USF/ICC Transformation Order* at 17672.
[72] *Id.* (emphases added).

Third, imposing subscription benchmarks on RDOF recipients ignores market conditions. Some consumers may decide that they simply do not want to subscribe to broadband service, or that 10/1 Mbps service is sufficient for their needs. Projecting subscribership out six years also ignores the effect of potential competition from other providers, whether new low-earth orbit satellite broadband providers capable of providing low-latency service, entities supported by other federal, state or municipal programs, or other new entrants. There may also be existing providers offering 10/1 Mbps service that decide to use their own resources to compete with an RDOF recipient. The monopoly situation presupposed by RDOF cannot be assumed by recipients over a six-year buildout period given the market variables that are well beyond the control of recipients.

These market conditions also assume that all rural communities eligible for support are homogenous, when in fact that is not the case. A WISPA member reported that it recently expanded service to three rural communities that lacked fixed broadband. In two of the communities, subscription rates matched projections; in the third, subscription fell far short of the other two. The WISP examined the data and concluded that the only material difference was that the average annual income level in the third community was $3,000 less than the other two. Similarly, a recent study by the New York City Comptroller[73] identified numerous areas where the broadband take rate is below 60 percent. Most are areas with low income levels. Others are largely populated by religious groups who shun Internet access along with other outside influences. In sum, subscription rates in areas without broadband cannot be adequately projected

[73] *See* New York City Comptroller, *Census and The City: Overcoming NYC's Digital Divide in the 2020 Census* (July 23, 2019), *available at* https://comptroller.nyc.gov/reports/census-and-the-city/ (last visited Sept. 19, 2019).

to the extent that an RDOF recipient should accept substantial legal responsibility if its calculations are off even by a small amount.

Fourth, requiring a subscription rate of 70 percent contravenes the Commission's own findings about broadband adoption rates, and would require RDOF recipients to exceed document rates in areas that are, by definition high-cost or extremely high-cost. According to the Commission's *2019 Broadband Deployment Report*, the adoption rate for broadband in 2017 was 69.7 percent overall, and 63.4 percent in non-urban core areas.[74] The Commission's proposal to require subscription of 70 percent would require an RDOF recipient to *exceed*, in a six-year time frame, the broadband adoption rate that the Commission itself has documented. This problem is compounded when accounting for the fact that "the average household adoption rate increases with median household income and population density, although the adoption rate decreases as the poverty rate and rural population rate increase."[75] A recent report prepared by the California Advanced Services Fund found that "[h]ouseholds in urban census tracts were reported to have significantly higher adoption rates and penetration rates than those census tracts identified as rural. . . . Based on CPUC collected data, census tracts identified as strictly urban had an adoption and penetration rate of 75.1% and 69.9% respectively compared to 40.4% and 23.7% for those census tracts identified as strictly rural."[76]

Fifth, a bidder agreeing to accept legal responsibility for broadband adoption may, at some point, be faced with the decision of where to invest its capital. Should it invest in building out to new areas to meet the performance obligations for deployment, or should it invest in

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[74] *2019 Broadband Deployment Report* at 29, ¶ 48, Fig. 12.
[75] *Id.* at 30, ¶ 49.
[76] California Advanced Services Fund Adoption Account, *Broadband Adoption Gap Analysis* (July 2019) at 6, *available at* http://broadbandbreakfast.com/2019/06/california-report-income-most-significant-factor-in-low-broadband-adoption/ (last visited Sept. 10, 2019).

creating demand for service to meet adoption benchmarks? This decision would inevitably depend on which enforcement regime is less strict, rather than focusing bidders' efforts on the overall objective of making broadband available to more locations.[77]

Sixth, subscription rate benchmarks undoubtedly will have a chilling effect on auction participation.[78] In determining whether to bid, many prospective bidders will wisely decide that the negative consequences of accepting a legal obligation based on adoption rates outweighs the benefits of receiving support. These entities will simply sit out the auction, making the auction less efficient and effective by reducing competition and leaving rural communities without RDOF support. Those that do decide to participate logically will be incentivized to bid at lower speeds so as to not risk failing to meet subscription targets for 100/20 Mbps or 1 Gbps/500 Mbps speeds. This is supported by the Commission's own data. The *2019 Broadband Deployment Report* found that consumers are more likely to subscribe to 25/3 Mbps service than 100/10 Mbps service in areas with low income, low density, high poverty and low population rate.[79] In these likely scenarios, requiring subscription benchmarks would contravene the Commission's objectives. Fewer areas will be funded at a higher per-location cost to the Commission. The auction will be less effective.

Seventh, adding a subscription benchmark as a condition to receiving support will deter third-party investment. Although limited by the costs attendant to obtaining and maintaining irrevocable letters of credit, the CAF Phase II program has been successful in enabling recipients to leverage federal support for outside investment from banks and other sources. These financial

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[77] This conundrum belies the underlying and serious problem that a subscription requirement would actually *create* a strong incentive to violate the Act's fundamental requirement that recipients only use support "for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e).
[78] *NPRM* at 16, ¶ 44.
[79] *2019 Broadband Deployment Report* at 29-30, ¶ 49, Fig. 13.

institutions logically would be less likely to invest if support were to be reduced because demand projections may prove to be inaccurate. Financial institutions will build the potential for non-compliance with subscription benchmarks into their risk profiles, and financing will be available – if at all – on less favorable terms. And, permitting the Commission to draw on letters of credit for shortfalls in broadband adoption would make it virtually impossible for small providers to obtain letters of credit.[80] Here again, the auction will fall short of achieving its overall deployment objective.

Finally, there is no evidence to show that existing rules imposed on CAF Phase recipients are insufficient to address any perceived adoption objective the Commission may, inadvisably, decide to implement. The CAF rules require recipients to assume a 70 percent subscription rate in designing their networks, and the Commission will not approve for funding any applicant that cannot meet that standard. The rules also require recipients to market the availability of their service in the supported area. And the rules require installation within 10 days of a customer request.

In sum, requiring RDOF recipients to meet subscription benchmarks is contrary to the statutory objectives of USF, contrary to the policy objectives of promoting auction participation to drive support to unserved areas, and contrary to the business judgment of prospective bidders, who will either not bid at all or bid at "safer" lower speed/latency combinations. Therefore, the Commission should reject this proposal.

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[80] *NPRM* at 16, ¶ 43.

IV. THE COMMISSION SHOULD PRIORITIZE SUPPORT TO AREAS THAT ARE MOST IN NEED OF SUPPORT

A. Census Blocks Without 25/3 Mbps Service Should Be Eligible For RDOF Support

The Commission proposes to include seven categories of census blocks in its Phase I reverse auction.[81] WISPA agrees that these categories generally should be included, but census blocks where broadband service of at least 25/3 Mbps is available should be excluded.[82] For example, if a CAF Phase II recipient (model-based or reverse auction) has accepted support to provide 10/1 Mbps service but actually offers 25/3 Mbps or greater service, the census blocks where 25/3 Mbps or greater service is offered should be excluded from the auction. WISPA also agrees that census blocks where a CAF Phase II auction winner has committed to provide at least 25/3 Mbps service should be excluded.[83] In addition, if the Commission does not conduct an auction for eligible rate-of-return areas that are almost entirely overlapped by an unsubsidized competitor before the initial RDOF auction is held, those census blocks should be included in the auction as well.[84]

B. The Commission Should Use Challenges To Finalize The List Of Census Blocks Eligible For Support

It is absolutely essential for the Commission to conduct challenges to its preliminary list of eligible census blocks.[85] Given the "inevitable lag" between the most recent Form 477 reporting for which data is available and the actual auction event,[86] there is a significant risk that,

[81] *Id.* at 17, ¶ 46.
[82] *See* Section I, *supra*. Both high-cost and extremely high-cost census blocks should be included, in effect combining the Remote Areas Fund with RDOF. *See id.* at 19, ¶ 50. As discussed *infra*, the Commission should prioritize those census blocks where the need is greatest.
[83] *NPRM* at 18, ¶ 48. However, census blocks where the auction winner has defaulted should be included in Phase I of the RDOF auction. *See id.* at 17, ¶ 46.
[84] *Id.* at 17, ¶ 47.
[85] *Id.* at 18, ¶ 48.
[86] *Id.*

without a process to identify newly served areas that should not be eligible for support, RDOF support could flow to census blocks where voice and 25/3 Mbps broadband service is available. Because fixed wireless connections of 25/3 Mbps service are growing at a faster rate than other technologies,[87] failing to implement a challenge process would adversely affect WISPs by awarding federal support for overbuilding privately funded or unsubsidized broadband networks.

WISPA notes, however, that challenge processes are time- and resource-intensive for both providers (challengers and those subject to challenges) and Commission staff that must review and adjudicate challenges. Presumably, as in the past, there would be two kinds of challenges – those seeking to have the Commission's preliminary list of "unserved" census blocks deemed "served" and therefore excluded from the list of eligible census blocks, and those seeking to have "served" census blocks deemed "unserved" and thus eligible for support. Following the submission of initial challenges, providers would have a certain period of time to refute the information. Based on the available evidence, Commission staff would then adopt an order resolving the challenges. With a significantly larger number of locations in RDOF, this process would likely drag on for months and require significant Commission staff resources.

C. If The Commission Proceeds With RDOF Auctions Before Ongoing Efforts To Improve The Quality And Reliability Of Data Have Been Finalized, The Commission Should Conduct Sequential Auction Events Prioritizing Census Blocks That Are Most In Need Of Support

While this proceeding advances, the Commission also will be taking critical steps to improve its location reporting – steps that, once implemented, should dramatically increase the accuracy and granularity of "served" and "unserved" locations and drastically reduce the number of challenges that Commission staff will need to resolve. First, in the *DODC Report and Order*,

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[87] *See* FCC, *Internet Access Services: Status as of December, 31, 2017*, Office of Economics & Analytics (August 2019) at 21, Fig. 21.

the Commission has directed USAC, under the direction of Commission bureaus and offices, to establish a portal for broadband providers to submit polygons depicting the areas where they provide service or can do so within 10 business days of a request for service without an extraordinary commitment of resources.[88] Second, in the *DODC FNPRM*, the Commission is seeking comment on its proposal to adopt a broadband serviceable location "fabric"[89] and the methodologies that can be used to define the polygons.[90]

The concurrent consideration and adoption of RDOF rules, the establishment of polygon methodologies for DODC reporting, the adoption and creation of the location fabric, the conduct of the challenge process, and the need for PRA Act approval will all take significant resources and significant, but uncertain time to complete.[91] Notwithstanding, Chairman Pai has indicated that he "look[s] forward to kicking off this new auction next year."[92] This raises important questions of which tasks must be completed in order for RDOF Phase I – or a portion of it – to occur within that time frame, without relying on inaccurate data that could award support to "served" areas.

The best case scenario would be to have all of the new data collection processes in place before the Commission conducts an RDOF auction. With the portal established, methodologies for polygons determined, and the fabric in place, broadband availability data should be more

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[88] *See DODC Report and Order* at 6, ¶¶ 12-13.
[89] *See DODC FNPRM* at 42, ¶ 101.
[90] *See id.* at 34, ¶ 80.
[91] WISPA appreciates that the DODC reporting process is separate from RDOF. However, understanding permissible methodologies for determining polygons can and should inform the challenge process and the broadband-serviceable location fabric, and reduce the need for Commission resolution of contested census blocks. The Commission elected to not adopt – and did not even reference – WISPA's proposal to establish "safe harbors" for fixed wireless broadband coverage in the *DODC Report and Order*. *See* Letter from S. Jenell Trigg, Counsel to WISPA, to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 11-10 and 10-90 (filed Oct. 22, 2018).
[92] Pai Statement.

current, accurate, and granular, there would be fewer challenges, and the auction could better direct support to unserved locations instead of census blocks.

Accordingly, if the Commission moves ahead with an RDOF auction before it is able to rely on the polygons to be submitted into the USAC portal or before the fabric is in place, WISPA proposes that Phase I of RDOF be segregated into a series of smaller auction events. This will enable a portion of the support to be awarded in the short term, while deferring further support allocations to a time when more accurate and more granular data can be used to more efficiently determine where there are eligible unserved locations.

The Commission should prioritize support to areas that have been determined to have no fixed broadband of at least 10/1 Mbps service, as the Commission suggests.[93] Prioritizing these areas would create an appropriate balance. Chairman Pai has stated that he "strongly oppose[s]" the idea of deferring Phase I of the RDOF auction "until the data for Phase II has been collected," adding that "it makes about as much sense as deciding not to provide medicine to anyone suffering from an illness outbreak until everyone who is sick from that outbreak has been identified."[94] Carrying this analogy forward, segregating Phase I into smaller events will enable the Commission to prioritize its treatment to those that are the sickest and have been sick the longest. Those that are less sick or are receiving treatment in the form of CAF Phase II support can be treated later. Stated another way, the perfect should not become the enemy of the good.

Census blocks without 10/1 Mbps service are areas most in need of fixed broadband, and the first auction event should solicit bids for these areas. Because price cap carriers have had CAF support for the longest period of time, areas where they do not provide 25/3 Mbps service and have not committed to serve in the CAF II process also should be prioritized. This will

[93] *See NPRM* at 21, ¶ 60.
[94] Pai Statement.

afford price cap carriers the opportunity to bid for support in areas where they provide less than 25/3 Mbps service and allow others the opportunity to outbid them.

The Commission should not prioritize support to areas entirely lacking 4G LTE mobile wireless broadband service.[95] As the Commission recently concluded, "both fixed and mobile services provide capabilities that satisfy the statutory definition of advanced telecommunications capability and, as before, that despite the increasing ubiquity and capabilities of mobile services, *there is insufficient evidence in the record to conclude that mobile and fixed broadband services are full substitutes in all cases*."[96] Areas where 4G mobile wireless service is unavailable should not be prioritized for RDOF support for fixed services, but rather should be targeted for Mobility Fund support.

In the absence of the broadband-serviceable location fabric and the polygon submissions contemplated by the *DODC FNPRM*, however, the Commission must rely on the most current Form 477 information and challenge processes to ensure that eligible census blocks are actually unserved. If anything, the pilot program has confirmed the deficiencies in the accuracy and granularity inherent in Form 477 data collection, and the Commission is taking positive steps to address those deficiencies in the *DODC FNPRM*. But, by establishing smaller auction events instead of a single Phase I RDOF auction, the Commission can minimize the number of challenges it will need to resolve, allowing the smaller prioritized auctions to move forward more quickly and deferring subsequent auction events until more accurate and granular data is available.

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[95] *See NPRM* at 21, ¶ 60.
[96] *2019 Broadband Deployment Report* at 5, ¶ 11 (emphasis added).

That said, the Commission should take steps to ensure that its prohibited communications rule does not apply for the duration of Phase I if Phase I is divided into smaller auction events.[97] It is appropriate for the Commission to limit communications that could have an effect on bids and bidding strategies, but prohibiting such communications across an extended period of time will have at least two detrimental effects. First, it will chill participation in the auction as potential bidders decide that they would prefer to have the option to have conversations about acquisitions, mergers, and other transactions that could be construed to involve bids or bidding strategies.[98] Second, for those providers that decide to participate in the auction, they could be prevented for an extended period of time from engaging in communications to acquire other networks, acquire, sell or lease spectrum, or enter into other transactions.

V. THE COMMISSION SHOULD ADOPT ITS TWO-STEP APPLICATION PROCESS AND AFFORD APPLICANTS FLEXIBILITY IN DEMONSTRATING THEIR FINANCIAL QUALIFICATIONS

A. The Commission Should Adopt Its Proposed Short-Form Application Requirements

WISPA supports the Commission's proposal to adopt a two-step application process modeled on the process it used for CAF Phase II reverse auction applicants.[99] The process established relevant gating criteria for the short form and deferred more detailed technical and financial submissions until after the auction, such that only auction winners needed to prepare and submit the more detailed long-form information for Commission staff review. As the Commission states, the two-step process is "an appropriate but not burdensome screen to ensure

[97] *See* 47 C.F.R. § 1.21002(b).
[98] In the *CAF Auction Procedures Public Notice*, the Commission also prohibited communications concerning "any arrangements relating to the post-auction market structure in an eligible area." *CAF Auction Procedures Public Notice* at 1478 ¶ 137. This phrase has proved to be difficult for bidders to understand. The Commission should use this opportunity to provide further clarity on the types of communications concerning post-auction market structure that would be prohibited.
[99] *NPRM* at 22-23, ¶¶ 65-68.

participation by qualified applicants while protecting the Fund, the integrity of the auction, and rural consumers."[100]

The Commission proposes to adopt the same specific short-form application requirements that it did for the CAF Phase II reverse auction, including ownership disclosure,[101] technical and financial qualifications certification,[102] type of technologies,[103] access to spectrum,[104] operational history and submission of financial documents,[105] and due diligence certification.[106] WISPA agrees that these requirements worked well to prepare bidders for the auction, deployment, and compliance processes, and to screen bidders to determine their basic qualifications to bid. In particular, and based on information from WISPA members that were successful in the CAF Phase II auction, the spectrum disclosure requirement was well-balanced and implemented in a reasonable manner, and the deferred submission of audited financial statements (where the applicant did not have them in advance) proved to be a good method to reduce table stakes for smaller entities that do not have audited financial statement in the ordinary course. As the Commission observes, "the vast majority of CAF Phase II auction support recipients were able to obtain audited financial statements by the required deadlines."[107] Overall, the short-form application was appropriately crafted for broadband providers that were most likely to meet their performance commitments and for Commission staff to expeditiously determine each applicant's basic qualifications.

[100] *Id.* at 22, ¶ 65.
[101] *Id.* at 23-24, ¶ 70.
[102] *Id.* at 24, ¶ 71.
[103] *Id.* at 24, ¶ 72.
[104] *Id.* at 24-25, ¶ 73.
[105] *Id.* at 25-26, ¶¶ 74-77.
[106] *Id.* at 26, ¶¶ 78-79.
[107] *Id.* at 26, ¶ 75.

B. The Commission Should Adopt Modifications To Its Financial Qualifications Requirements

WISPA generally supports the Commission's proposed long-form application process and the requirement for auction winners to submit detailed technical and financial information and certification of eligible telecommunications carrier status, consistent with the CAF Phase II process. However, in citing the benefits of letters of credit, the Commission acknowledges that "we also found that winning bidders complained of the high cost of obtaining and maintaining a letter of credit, such that it would 'consume too much of the limited capital available to . . . [and] leave [in]sufficient funds for . . . [CAF Phase II auction] construction.'"[108]

WISPA shares these concerns. Its members who are CAF auction winners have experienced similar difficulties obtaining letters of credit, and the time and costs to maintain letters of credit are substantial. Based on input from its members who are successful CAF Phase II auction winners and recipients of support, WISPA recommends that the Commission adopt rules that will afford RDOF auction winners greater financial flexibility to free up more private capital and encourage greater investment from third parties.

1. <u>The Commission Should Allow Applicants To Rely On Performance Bonds As An Alternative To Letters Of Credit</u>

The Commission asks if there are "viable, less costly alternatives [to letters of credit] that still minimize risk to public funds?"[109] The simple answer is "yes." The Commission can and should allow RDOF auction winners to obtain performance bonds as an alternative to obtaining letters of credit. Despite the Commission's past misgivings about relying on performance bonds,[110] WISPA believes that the Commission's concerns can be readily addressed with the

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[108] *Id.* at 29-30, ¶ 89 (citation omitted).
[109] *Id.* at 30, ¶ 89.
[110] *See CAF Phase II Auction Order*; *Rural Broadband Experiments Order*; *USF/ICC Transformation Order* at 17810-11.

appropriate rules and safeguards. To be clear, WISPA is not proposing to replace the letter of credit requirement, which contributes to ensuring the integrity of the high-cost funds, but is recommending an alternative financial instrument on which some bidders may choose to rely.

In the *CAF Phase II Auction Order*, the Commission explained why it was requiring letters of credit and bankruptcy opinion letters:

> Letters of credit permit the Commission to immediately reclaim support that has been provided in the event the recipient is not furthering the objectives of universal service by complying with the Commission's rules or requirements. They also have the added advantage of minimizing the possibility that the support becomes property of a recipient's bankruptcy estate for an extended period of time, thereby preventing the funds from being used promptly to accomplish our goals.[111]

In the *Draft PR-USVI Fund Order*, the Commission is scheduled to approve high-cost support for Puerto Rico and the U.S. Virgin Islands.[112] In addition to citing the two reasons for preferring letters of credit, the Commission states that "[m]erely requiring a performance bond would not provide the same level of protection and would require the involvement of a third party to adjudicate any disputes that arise, which would complicate our process and unnecessarily limit the authority of the Commission to allocate funds."[113]

As explained below, if rules are appropriately crafted, performance bonds can accomplish the same objectives as letters of credit, with the added benefit of giving RDOF recipients flexibility to rely on a less expensive or otherwise better financial instrument. As The Surety & Fidelity Association of America and the National Association of Surety Bond Producers have explained,

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[111] *CAF Phase II Auction Order* at 5990 ¶ 120.

[112] *The Uniendo a Puerto Rico and the Connect USVI Fund, et al.*, Report and Order and Order on Reconsideration, WC Docket Nos. 18-143, 10-90 and 14-48, FCC-CIR1909-01 (Sept. 5, 2019) ("*Draft PR-USVI Fund Order*").

[113] *Id.* at 41, ¶ 75.

> First, a performance bond assures that the successful carrier is qualified to perform the obligations of the award, including the full performance of the building and repair of the network. Second, the bond serves as a "deep pocket" in the event the carrier fails. The first form of review, prequalification, is the result of the surety's review of the financial strengths and capabilities of the carrier in determining whether to provide the bond. . . . In comparison, a letter of credit is secured by a specific liquid asset(s), has a specific expiration date (generally one year, bonds remain in force until the duration of the contract), and simply does not provide the same financial guarantee to the government.[114]

In addition to these benefits, and based on its discussions with these two associations, WISPA understands that performance bonds often cost about 0.5-1.5 percent of the value of the amount to be secured. By contrast some CAF Phase II recipients are finding that the cost to obtain and maintain a letter of credit can approach 10 percent of the annual support amount. The cost savings for performance bonds could save RDOF recipients hundreds of thousands of dollars in bank fees over time – funds that could otherwise be spent on broadband deployment. Overall, the substantially reduced carrying costs could re-direct tens of millions of dollars from letters of credit fees to deployment.

In the past, proposals suggesting the use of performance bonds for USF programs did not include specific criteria designed to address the Commission's concerns. Below, WISPA proposes the following specific requirements that RDOF applicants relying on performance bonds would need to follow:

First, the bond issuer would need to be licensed by the state or Territory where the supported census blocks are located. Like insurance companies, the vast majority of all bonding companies are state-regulated. The proposed recommendation to require the bond to be issued for each state where the supported census blocks are located will, like letters of credit, limit the

[114] Comments of The Surety & Fidelity Association of America and the National Association of Surety Bond Producers, WC Docket Nos. 18-143, 10-90 and 14-58 (filed June 29, 2018) at 2.

amount of support subject to the performance bond to a smaller amount in cases where an RDOF applicant wins support in more than one state.

Second, the bond issuer must hold and maintain during the term of the bond a Certificate of Authority and meet the federal requirements of Treasury Circular 570.[115] WISPA understands that Treasury Circular 570 establishes per-bond limits that can be exceeded only with coinsurance, reinsurance or other authorized methods.

Third, the bond issuer must have a Best's Financial Strength Rating (FSR) of A- or better. A Best's FSR is issued by A.M. Best, and provides the independent opinion of the largest insurance rating agency in the world as to a company's "strength and ability to meet its ongoing insurance policy and contract obligations."[116] A rating of A- or better is reserved only for those insurance companies that A.M. Best has rated as having an excellent or superior ability to meet their ongoing insurance obligations after having conducted an extensive review of potential risks to the company's financial health comprising an analysis of the company's underwriting, management, risk appetite, peers and other indicia of stability.[117] Moreover, because the Best's FSRs are regularly updated, the Commission could require bidders to obtain a bond from a compliant issuer should the original bond issuer's FSR ever drop below A-.

Fourth, the Commission can require agreements between bond issuers and RDOF auction winners to ensure that the Commission's financial investment can be quickly recovered. Performance bonds typically assume that the bond issuer will first arrange for performance rather than immediate payment, known in the context of surety bonds as "forfeiture." Accordingly, the

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[115] Department Circular 570, effective July 1, 2019, *available at* https://www.fiscal.treasury.gov/surety-bonds/circular-570.html (last visited Sept. 10, 2019).
[116] Best's Financial Strength Rating Guide, Version 010219, *available at* http://www.ambest.com/-ratings/guide.pdf (last visited Sept. 11, 2019).
[117] *Id.*; *see also* Understanding Best's Credit Ratings, Jan. 2, 2019, *available at* http://-www3.ambest.com/ambv/ratingmethodology/OpenPDF.aspx?rc=238151 (last visited Sept. 11, 2019).

Commission could require auction winners using performance bonds to write into the bond that, should it be necessary for the Commission to enforce the bond, the Commission may demand immediate forfeiture instead of performance.

Taken together, these criteria compare favorably to the criteria the Commission has established for letters of credit. With appropriate contractual provisions, WISPA believes that the Commission can immediately recover the support it has disbursed and ensure that the funds secured by the performance bond do not become the property of the RDOF recipient's bankruptcy estate.

In requiring only letters of credit, the Commission also has attempted to rely on its very limited experience with CAF Phase II auction winners, stating that "[e]xperience shows that a competitive support program can obtain broad participation with a letter of credit requirement in place – the CAF II Auction received applications from 220 qualified applicants and awarded $1.488 billion in support to 103 winning applicants."[118] But this "broad participation" is irrelevant to the level of participation that the RDOF auction will require if the Commission intends to accomplish its universal service objectives. The RDOF auction will cover significantly more areas than CAF Phase II, so encouraging even broader participation will be essential to a successful process. Moreover, although the Commission concludes that receiving 220 applications and awarded support to 103 winners constitutes a successful CAF Phase II auction, it does not have data on how many prospective bidders decided to *not* participate in the auction or how many decided to drop out of the bidding because of concerns that they would not be able to obtain a letter of credit on acceptable terms. And, although eligible banks did provide letters of credit for the first support year when there are no buildout requirements and thus very

[118] *NPRM* at 41, ¶ 75 (footnote omitted).

little if any risk to the bank, the risk increases dramatically in year three as the 40-percent buildout milestone becomes relevant and the value of the letter of credit increases to three times the initial first-year value.

Finally, WISPA observes that the Commission relies on performance bonds as a condition to the grant of satellite construction and launch authority,[119] and so already has long-running experience with surety bonds as a means to guarantee compliance obligations. While ratepayer contributions are not at stake with respect to satellite authorizations, the entire reason for requiring surety bonds is to prevent licensees from squandering federal spectrum resources by failing to meet requirements for building and deploying infrastructure, thus warehousing spectrum and foreclosing other parties from using those resources. Surety bonds are the method the Commission chose in that instance for incentivizing performance, and suitably structured surety bonds can serve the same function in the RDOF program.

Allowing RDOF applicants to rely on performance bonds offers a secure and reliable alternative to letters of credit to secure performance. WISPA has proposed above a detailed approach by which the Commission can establish rigorous standards to ensure that bonding companies are creditworthy, stable, and sustainable, and will ensure that support is promptly returned in the event of default. The Commission should adopt this proposal.

2. <u>The Commission Should Further Reduce The Value Of Letters Of Credit As Performance Milestones Are Met</u>

Consistent with its CAF Phase II rules, the Commission proposes to allow RDOF recipients to reduce the value of their letters of credit to 90 percent upon meeting the 60 percent service milestone and to 60 percent upon meeting the 80 percent service milestone.[120] WISPA

[119] 47 C.F.R. § 25.165.
[120] *NPRM* at 28-29, ¶ 86.

agrees that, for those RDOF auction winners electing to submit irrevocable letters of credit, the Commission should follow the same rules it adopted for CAF Phase II, but should alter the phase-down schedule to reduce the financial impact that letters of credit have on CAF recipients. Letters of credit are treated as debt for accounting purposes, thereby limiting the borrowing power a CAF recipient may have. This, in turn, means that CAF recipients are limited in the amount they can borrow, or will be forced to accept more onerous terms from lenders. While the impact of bank fees of up to 10 percent is substantial, the cumulative effect is greater when underwriting policies and the negative consequences of letters of credit are fully considered.

To ease the underwriting process and free up more investment capital, WISPA proposes that the value of letters of credit should be reduced by the same percentage as the service milestone that the RDOF recipient has satisfied. In other words, once the recipient meets the 40-percent milestone, the value of the letter of credit should be reduced by 40 percent of the total value that would otherwise be applicable; once the recipient meets the 60-percent milestone, the value of the letter of credit should be reduced by 60 percent of the total value that would otherwise be applicable; and once the recipient meets the 80-percent milestone, the value of the letter of credit should be reduced by 80 percent of the total value that would otherwise be applicable.

WISPA appreciates that the Commission has the responsibility to ensure that contributions to the high-cost fund are protected and recoverable if recipients fail to meet their buildout milestones. And WISPA also understands that the Commission cannot be embroiled in litigation if the recipient becomes bankrupt. Overall, the letter of credit requirement has served an important objective in CAF, and it should remain an alternative for RDOF.

Although the Commission may cite the CAF Phase II rules and correctly observe that "a competitive support program can obtain broad participation with a letter of credit requirement in place,"[121] RDOF is intended to be a substantially larger program with significantly more areas expected to be eligible for support. The Commission cannot discount the possibility that many census blocks did not receive winning bids in the CAF Phase II reverse auction because the letter of credit requirements were perceived by bidders and banking institutions as being too onerous. The Commission also cannot at this juncture claim success in the initial two years of CAF Phase II when, as described above, letters of credit are not subject to draw until the end of the third year of support. Reducing the value of letters of credit to correspond to service milestones would encourage greater participation in the RDOF auction for many more high-cost and extremely high-cost locations, thereby ensuring a more successful RDOF auction.

Conclusion

As the *NPRM* affirms, the proposed framework for the RDOF program represents a vital step to close the rural digital divide."[122] This objective can be better achieved if the Commission adopts WISPA's recommendations to narrow the gap in its bidding tiers to more accurately reflect consumer broadband subscription purchases and to incentivize accelerated buildout. The Commission also should adopt WISPA's proposals to allow performance bonds as an alternative to letters of credit and to reduce the value of letters of credit more rapidly as buildout milestones are met. Taken together, these proposals will encourage greater participation in the RDOF auction, encourage expedited broadband service to rural areas, and make more support and

[121] *Draft PR-USVI Fund Order* at 41, ¶ 75.
[122] *NPRM* at 2, ¶ 4.

investment capital available to auction winners, without undermining the integrity of the RDOF program or creating greater risk to the Commission's financial profile.

The Commission also should not add subscription milestones as a performance requirement – if adopted, this proposal would effectively convert the RDOF program from a "provision, maintain and upgrade" deployment program into an adoption program, contravening the Act and undermining Congressional and Commission objectives. RDOF recipients cannot accept legal responsibility predicated on future consumer demand that can be affected by evolving market conditions beyond the control of the recipient.

As for the timing of the auction, the Commission must carefully balance the future availability of better data with the need to make support available expeditiously. To this end, the Commission should consider prioritizing support to areas that lack 10/1 Mbps service following a challenge process, with other areas available for funding in subsequent auction events. Ultimately, the scheduling of auctions will depend on the timing of other parallel processes such as the adoption of the broadband-serviceable location fabric and polygon methodologies, the implementation of challenge processes, and compliance with PRA obligations.

Respectfully submitted,

WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

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