



WASHINGTON, DC

STEPHEN E. CORAN
202.416.6744
SCORAN@LERMANSENTER.COM

June 30, 2015

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Written Ex Parte Presentation
WC Docket No. 10-90**

Dear Ms. Dortch:

On behalf of the Wireless Internet Service Providers Association (“WISPA”), this letter proposes a competitive bidding process for Phase II of the Connect America Fund (“CAF”) that builds on the ex parte letters submitted by USTelecom on April 10, 2015¹ and by the American Cable Association (“ACA”) on June 1, 2015.² As described below, WISPA’s proposal adopts the simplicity of ACA’s single-round bidding approach with the cost-effective objectives of the USTelecom Proposal. In addition, WISPA recommends pre-bidding and post-bidding financial and technical qualifications that will encourage participation by those applicants best able to meet CAF goals without foreclosing participation through stringent entry criteria.

WISPA commends both USTelecom and ACA for their thoughtful and detailed approaches, and appreciates their willingness to socialize their proposals with WISPA. Both proposals deserve serious consideration as frameworks for competitive bidding. On the whole, however, WISPA believes that both plans are lacking. USTelecom’s approach is overly complicated and would require a time-consuming bidding process, and it appears to favor incumbent price cap carriers that will have already declined model-based support. While simpler to implement, ACA’s approach favors service to locations over cost-efficiency, which sacrifices one of the potential benefits of competitive bidding.

Further, both ACA and USTelecom exclude detailed discussion of several important issues that affect qualification to participate in the competitive bidding process. This is of

¹ See Letter from Robert Mayer, USTelecom Vice President, Industry and State Affairs, to Marlene H. Dortch, FCC Secretary, WC Docket No. 10-90 (filed April 10, 2015) (“USTelecom Proposal”).

² See Letter from Thomas Cohen, Counsel to ACA, to Marlene H. Dortch, FCC Secretary, WC Docket No. 10-90 (filed June 1, 2015) (“ACA Proposal”).



critical significance to WISPA's members and other small businesses – if the initial pre-bidding financial and technical qualifications are too onerous, they will not be eligible to participate.

WISPA believes that the two proposals are building blocks for a process that can be modified to form a technology-neutral proposal that can enable robust participation, would be simple to implement, would promote cost-efficiency and would afford a large number of qualified broadband providers a fair opportunity to receive CAF support. WISPA recommends the following.

Competitive Bidding Proposal

Pre-bidding Financial and Technical Qualifications

A critical component of any competitive bidding proposal is the entry criteria that determines who has the opportunity to participate in the bidding process. In Section 3.a of its proposal, USTelecom suggests that “[a]ll participants in a Stage must meet qualification criteria, including a technical and financial review and submission of a deposit, before the bidding begins.” USTelecom does not elaborate, but leaves undescribed the specific entry criteria for participating in the competitive bidding process and the amount of any proposed deposit.

In footnote 13 of its proposal, ACA suggests that a bidder would be technically and financially qualified “if it operates a network providing broadband and voice services with performance levels and prices meeting that which is required by recipients of model-based support and has filed Form 477 for the previous three years.”³ The ACA Proposal creates barriers that will exclude many small providers from participating. First, it requires a bidder to have experience in providing both broadband *and* voice services. Many of WISPA's members have deployed broadband services in unserved and underserved areas but have chosen not to offer competitive voice services. This business decision should not be a disqualifying factor at the starting gate. Second, the ACA Proposal requires a bidder to have been in business for at least three years, and forecloses participation by entities that have been in business for less time but that may be very well funded and technically qualified. In sum, the ACA Proposal would eliminate from participation a large number of interested providers that may be best able to serve the largest number of locations (under ACA's plan) or deploy in the most cost-effective manner (under USTelecom's plan).

WISPA recommends the following. With respect to technical qualifications, a bidder should certify in its pre-bidding (or short form) application that it (1) has constructed and operated a broadband (but not necessarily voice) network for at least one year, (2) has filed Form 477 for the two six-month periods immediately preceding the beginning of the competitive bidding, and (3) is capable of meeting the requisite build-out, speed and latency requirements. This proposal will enable experienced broadband providers to participate in the competitive bidding process, but exclude those that have not previously deployed broadband service. The

³ *Id.* at 5 n.13.



Commission also would obtain an upfront certification that the build-out, speed and latency criteria can be met.

WISPA does not believe that a prospective bidder should be required to submit detailed technical showings at the pre-bidding phase of the process. It would be wasteful for both prospective bidders and the Commission's resources to require this information from all prospective bidders for all areas of the country when the outcome of competitive bidding is not known. Rather, certifications of experience with the particular technologies and an ability to meet the speed and latency criteria would satisfy the Commission's objective of ensuring participation by only qualified applicants. More detailed technical information could be provided post-bidding, as the Commission required in the rural broadband experiment program.

With respect to initial financial qualifications, WISPA recommends that an applicant be required to certify that, if successful, it will have the ability to meet at least one of the following post-selection financial criteria: (1) a performance bond equal to the amount of the subsidy that declines as build-out obligations are met, (2) an irrevocable letter of credit for 50 percent of the support amount that terminates upon completion of build-out, or (3) one year of audited financial statements. Because there is no way prior to the competitive bidding process to determine which bidders will be successful and which will not, the certification acts as a mechanism to ensure that the applicant will undergo more extensive financial scrutiny if it is a winning bidder. Post-bidding financial review, as discussed below, should of course be more rigorous.

In combination with the proposed Form 477 requirement, WISPA's approach requires that bidders be established broadband providers with a track record of deployment and operation and that they have complied with Commission filing requirements for at least one year. ACA's proposal for three years of Form 477 filings would foreclose many smaller and newer businesses from participating, but a one-year history of compliance would appropriately exclude from participation startups and other entities that have not operated a broadband system, have not complied with the regulatory requirement to submit Form 477 or do not intend to submit independent evidence of financial qualification. Moreover, the Commission could quickly and easily review a bidder's certifications and confirm the filing of its Form 477 prior to the commencement of bidding without having to undertake significant and time-consuming qualification review.

WISPA does not believe that applicants should be required to make a deposit with the Commission prior to the competitive bidding, as USTelecom suggests. A bidder will not be acquiring licenses in a traditional auction, but will be bidding to see it is willing to accept less support from the CAF than other bidders. An applicant should not be required to tie up its capital during the competitive bidding process – which could last several weeks – when it is possible that the bidder will not be successful such that no payment to the Commission would be required. As discussed below, WISPA believes that post-bidding demonstration of financial qualifications can ensure that only qualified applicants are eligible to receive CAF support.

The above recommendations are intended to be technology-neutral and enable participation from large providers that seek CAF support for large areas and small providers that

may desire support for only a few census blocks, while at the same time excluding participation by those that have no experience or ability to deploy funded services at specified speed and latency criteria. Further, the initial financial qualifications should not act as a barrier to keep small businesses or certain technologies out of the process altogether.

The Competitive Bidding Process

Bidding Stages

WISPA proposes two significant modifications to the ACA Proposal that blend the simplicity of that approach with the cost-effective benefits of the USTelecom Proposal. WISPA agrees that there should be four bidding stages, but that the speed tiers should be established differently, as follows:

- Stage 1 – Networks Capable of Offering 100 Mbps/20 Mbps
- Stage 2 – Networks Capable of Offering 25 Mbps/3 Mbps
- Stage 3 – Networks Capable of Offering 10 Mbps/1 Mbps
- Stage 4 – Networks Capable of Offering 4 Mbps/1 Mbps

WISPA's proposal eliminates ACA's proposed upper tier of 100 Mbps/20 Mbps, and adds a new 4 Mbps/1 Mbps tier (new Stage 4) for any funds that remain after bidding has been completed for the first three stages. WISPA believes that there will be few takers for the 1 Gbps/500 Mbps speeds proposed by ACA, and that such speeds disproportionately favor fiber builds in a small number of census blocks located near existing plant. Further, pricing requirements may limit the areas where any bidder could obtain a return on investment within a reasonable time horizon. The Stages 1 and 2 proposed by WISPA (identical to Stages 2 and 3 in the ACA Proposal) should be attractive to large and small broadband providers using a variety of technologies. Like ACA, WISPA proposes a "waterfall" process in which the stages would occur sequentially, with Stage 1 occurring first. Succeeding stages would only be funded to the extent funds remain. WISPA anticipates that nearly all of the support would be distributed in Stages 1-3.

Support Level and Cost-Effectiveness

The ACA Proposal favors applicants that offer to serve more unserved locations in a given area. To achieve this objective, ACA proposes a single round of bidding⁴ in which all bids will be at the cost model price for the census block(s) on which the bidder elects to bid.⁵ Bidders can place multiple bids for census blocks that nest within counties.⁶

⁴ See *id.* at 4 n.8.

⁵ See *id.* at 4-5.

⁶ See *id.* at 4.



WISPA believes that the ACA Proposal can be improved. First, the competitive bidding process should reward those bidders that are willing to accept a support level that is lower than the reserve price calculated by the cost model for the subject census blocks. If the level of support that price cap carriers reject is the same (or nearly so) in the competitive bidding process, those carriers may have little incentive to accept the statewide commitment if they can “cherry-pick” those same unserved locations in the bidding process.

Second, the ACA Proposal does not afford a bidder the opportunity to accept a lesser level of support, meaning that more funds are allocated to fewer locations. While service to a great number of locations is a laudable goal, a large number of unfunded census blocks may remain if the finite amount of support is depleted. Inevitably, these remaining unfunded locations will be the most expensive and most difficult to serve.

To remedy the likelihood of this occurring, WISPA proposes to modify the ACA Proposal by allowing a bidder to bid, in a single round, at a specified incremental percentage below the aggregate cost model price. After selecting the census block or blocks in packages as ACA proposes, the bidder would then select a bid amount at the cost model price or at some percentage level – WISPA suggests increments of five percent – below the cost model price. For example, if the composite cost model price for the census blocks on which a bidder elects to bid is \$50.00, it could bid \$50.00 or \$47.50, \$45.00, etc. In the event of a tie, where more than one bidder selects the same level of support, the winning bid would be the one selecting the largest number of locations. In all other respects, the ACA Proposal would be implemented.⁷ Alternatively, the Commission could employ the same process it adopted for the rural broadband experiment program and allow bidders to self-select the amount of their bids.

With this variation, the competitive bidding process would favor cost-effectiveness, without invoking the complexity of the USTelecom Proposal. Moreover, with only a single round of bidding, each stage of the competitive bidding process would conclude quickly.⁸

⁷ In Section 5.k of its proposal, USTelecom implies that the Commission will identify next-in-line bidders when the competitive bidding concludes. WISPA strongly opposes this approach. Identifying next-in-line bidders will encourage the filing of petitions against the winning bidders by those that submitted the second-lowest bid. The effect of this will be protracted litigation that will delay funding decisions indefinitely. The Commission should identify only the winning bidder. If and when a winning bidder is disqualified, the Commission can then identify the next-in-line bidder, or it can conduct a new competitive bidding process for unfunded census blocks. Regardless of the approach, WISPA strongly believes that a winning bidder must first be disqualified before a new winning bidder is identified.

⁸ WISPA disagrees strongly with USTelecom’s proposal that each round of a multi-round bidding process last one week “to allow for analysis and adjustment between rounds.” USTelecom Proposal at 3. WISPA believes that rounds lasting a full week will unnecessarily extend the duration of the competitive bidding. Moreover, if the Commission applies its existing anti-collusion rules, the anti-collusion period would last several months – from the filing of the

Post-Selection Qualifications

WISPA recommends adoption of an additional proposal for CAF Phase II competitive bidding.

To demonstrate financial qualifications after the competitive bidding process has concluded, WISPA suggests a flexible approach by which winning bidders can submit either (1) a performance bond equal to the amount of the subsidy that declines as build-out obligations are met, (2) an irrevocable letter of credit for 50 percent of the support amount that terminates upon completion of build-out, or (3) one year of audited financial statements.

WISPA previously recommended a performance bond because it costs less to obtain than a letter of credit, transfers the risk from the Commission to a qualified third party, and can decline over time as milestones are met.⁹ WISPA continues to believe that this may be the preferred approach for many bidders. However, a winning bidder should have the flexibility to obtain a letter of credit under the less onerous approach urged by WISPA, USTelecom and others.¹⁰ Finally, for companies that have not been in business for a long time or qualified small providers that cannot afford to obtain a performance bond or a letter of credit, the submission of one year of audited financial statements should be a permissible alternative.

Common to each of these options is the requirement of independent financial verification by a neutral third party that is subject to professional standards for auditing financial statements, issuing performance bonds or underwriting letters of credit.¹¹ By providing winning bidders

initial application, through a multi-round bidding process and ending with the filing of post-bidding documents. Even with a truncated process for rural broadband experiments, the anti-collusion process lasted two months. This has the effect of limiting discussions related to acquisitions, mergers and other business arrangements between bidders.

⁹ See Comments of WISPA, WC Docket No. 10-90, *et al.* (filed Jan. 18, 2012), at 16 (“A performance bond can be less expensive for the proposed recipient to acquire, and there is value in allowing third parties to evaluate the business plan that the bond would support, thus increasing the likelihood that the funding would be used only to fund viable projects.”). See also 47 C.F.R. § 25.165 (rule requiring performance bonds for satellite service licensees).

¹⁰ See, e.g., Comments of WISPA, WC Docket Nos. 10-90 and 14-259 (filed March 30, 2015); Comments of USTelecom WC Docket Nos. 10-90 and 14-259 (filed March 30, 2015); Comments of the National Rural Electric Cooperative Association, WC Docket Nos. 10-90 and 14-259 (filed March 30, 2015); Comments of the National Rural Utilities Cooperative Finance Corporation, WC Docket Nos. 10-90 and 14-259 (filed March 30, 2015).

¹¹ See, e.g., *Connect America Fund*, WC Docket No. 10-90, *et al.*, Order, DA 15-698 (rel. June 15, 2015), at 4 (noting that audited financial statements are prepared by a neutral third party according to Generally Accepted Accounting Principles). By extension, the same benefits of third party independence are applicable to performance bonds and letters of credit...

LS

Marlene H. Dortch, Secretary

June 30, 2015

Page 7

with options, the Commission can limit the number of waiver requests that seek to rely on other sources of information, such as unaudited financial statements, tax returns and other documentation.

One of the lessons learned from the rural broadband experiment program is that the financial requirements were overly burdensome for small providers and those that were not in business for at least three years (and thus could not produce three years of audited financial statements). A number of technically qualified provisionally selected applicants were subsequently disqualified, even though that had experience in constructing and operating broadband networks at low cost. WISPA believes that the combination of pre-bidding technical and financial certifications plus the post-selection requirements that afford bidders flexibility and the Commission assurance of financial capability will yield highly qualified bidders with little risk of disqualification or default.

Pursuant to Section 1.1206 of the Commission's Rules, this letter is being filed electronically via the Electronic Comment Filing System in the above-captioned proceeding.

Respectfully submitted,



Stephen E. Coran
Counsel to WISPA

cc: Carol Matthey
Alex Minard
Katie King
Heidi Lankau