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December 24, 2015

Via ECFS

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

Re: *Ex Parte* Filing of the American Cable Association on the Connect America Fund, WC Docket No. 10-90

Dear Ms. Dortch:

On December 22, 2015, Ross Lieberman, American Cable Association ("ACA"), and the undersigned, Thomas Cohen, Kelley Drye & Warren LLP, Counsel to ACA, had a telephone call with Stephanie Weiner, Senior Legal Advisor, Wireline, to Chairman Wheeler, to discuss the Connect America Fund ("CAF") Phase II competitive bidding process and the order on circulation to establish a framework for that process. For the Phase II auctions, a key objective of the Commission and ACA jibes: both want to maximize participation by service providers in the process. To achieve this outcome, especially with respect to smaller providers, ACA has focused on two aspects of the application and bidding process: financial qualifications for smaller providers to participate in the process, and broadband performance requirements.

Benefits of Maximizing Participation in the CAF Phase II Competitive Bidding Process

The benefits of maximizing participation are myriad. For the Commission, an auction cannot drive prices in all eligible areas to their most efficient level without maximum participation. Further, by driving prices down, the Commission can free up support to increase the number of unserved areas that obtain broadband service. For ACA, which represents many experienced network and service providers operating in or near eligible areas, as well as for other new entrants, the auction presents an opportunity for these providers to offer service to new customers and increase the size of their businesses. In sum, seeking to maximize participation in the auction should be a fundamental driver for the Commission.

Putting the CAF Phase II Competitive Bidding Process in Perspective

The Commission's competitive bidding process represents a continuing effort of the Commission to award limited funding to bring broadband service to eligible areas as efficiently as possible. It builds on the recently completed CAF Phase II "right of first refusal process," which, rather than seeking to award funding most efficiently and to have recipients of support deploy high performance broadband service, opted to expedite deployment. This process awarded to price cap carriers approximately $1.5 billion of support annually based on the Commission's cost-model to be expended over a six year period to provide 10/1 Mbps broadband service in unserved and high-cost areas. When the six-year term ends, the Commission plans to award support by a competitive bidding process, which makes it even more important to establish the proper precedent in adopting a framework for the CAF Phase II competitive bidding process. ACA submits that the Commission should view the support amounts in the "right of first refusal process" as the maximum that should be awarded and the performance metrics as the minimum that should be required. For the competitive bidding process, the Commission can and should achieve much more, especially because consumers have demonstrated increased needs for higher broadband peformance, service providers have shown they can build networks more efficiently, and the market is expected to evolve substantially during the ten-year life of the program.

Maximizing Auction Participation: Financial Qualifications for Smaller Providers

ACA understands that the Commission is proposing that an experienced service provider will be considered financially qualified if it submits in advance of bidding one year of audited financials, and that if it is a winning bidder, it submits a Letter of Credit ("LoC") from a "top 100 bank" that has an investment grade or better credit rating and that is insured by the FDIC or FCSIC. These requirements may work for larger providers, especially those that are public and have relationships with major banks, but for hundreds of ACA's smaller providers, they will effectively preclude them from participating in the auction.

ACA has been working with the Wireless Internet Service Providers Association ("WISPA") to develop an alternative approach by which smaller providers can demonstrate they are financially qualified. The following summarizes key aspects of the approach they have proposed thus far to the Commission:[1]

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[1] *See* Letter from Ross L. Lieberman, American Cable Association, and Stephen F. Coran, Wireless Internet Service Providers Association to Marlene H. Dortch, Secretary, Federal

- With respect to satisifying the need to provide audited financials in advance of bidding, the Commission should permit a Small Experienced Service Provider ("SESP")[2] to meet the pre-auction financial qualifications by providing the Commission with a deposit of $25,000, to be paid at the time the short-form application is submitted.[3] The deposit would be refunded if the SESP is not a winning bidder in the auction. If the SESP is a winning bidder, the deposit would be retained until the bidder presents to the Commission audited financials. If, however, the winning bidder fails to present audited financials, it would forfeit at least the size of the deposit as an enforcement penalty.[4]

- With respect to the requirement that a winning bidder provide a LoC from a qualifying bank, the Commission should deem a LoC from an SESP to be acceptable if it is issued or confirmed by a Large Commercial Bank – defined by the Federal Reserve as an insured bank with $300 million or more in consolidated assets – with at least an "investment grade" (or equivalent) rating from Moody's, Standard and Poors, Fitch, or another nationally recognized credit rating agency and insured by the FDIC or FSLIC.

- The Commission should permit a winning bidder that qualifies as an SESP one year following the auction to meet post-auction financial qualification requirements, including its submission of one year of audited financial statements.

While WISPA and ACA believe their current approach has merit, among the aspects they are exploring further is the development of a more precise definition of a credit rating "equivalent" to an investment grade rating made by a Nationally Recognized Statistical Rating Organization. This is important for SESPs because few banks outside the top 100 banks are rated by these organizations.

Communications Commission, WC Docket No. 10-90 (Dec. 17, 2015) ("ACA/WISPA *Ex Parte*").

2 ACA and WISPA defined a SESP as a broadband provider that has filed Form 477 in each of the three most recent years and that has reported fewer than 25,000 broadband connections for all speed tiers in its most recent Form 477 filing, aggregated over all affiliates.

3 The Commission should treat the deposit as if it were an upfront payment for forward auctions.

4 *See* ACA/WISPA *Ex Parte* at n.4.

Maximizing Auction Participation: Broadband Performance Requirements

ACA additionally submits[5] that to maximize the number of bidders in the auction, the Commission should award preferences to bidders that offer to provide higher performance broadband service over "future proof" networks in exchange for support.[6] That is, the Commission should consider both the amount of support bid and the performance characteristics of the proposed network in determining whether a bidder wins the auction. Establishing such preferences would maximize auction participation because the Commission would make it possible for wireline providers without infrastructure in an eligible area (*e.g.*, neighboring cable operators and rate-of-return carriers) to compete on an even footing for support against incumbent price cap carriers and those that may propose to serve the area through fixed wireless, mobile, or satellite technologies. Let us elaborate why this approach is justified.

If the Commission establishes performance requirements materially lower than those provided by "future proof" networks, *e.g.* the Commission only requires 25/3 Mbps, new wireline entrants are unlikely to participate because incumbent price cap carriers have an inherent advantage in the auction by virtue of having already deployed capital and facilities in that eligible area. These new entrants also will be placed on uneven footing with other service providers using "non-future proof" technologies, including fixed wireless, mobile wireless or satellite technologies.[7] With less participation in the auction, the incubments, as well as providers without "future proof" networks, can win without bidding down to the most efficient level. That result is contrary to the Commission's objectives for awarding funding – and is contrary to the public interest.

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[5] ACA's views on broadband performance requirements may differ from those of WISPA.

[6] As an alternative to establishing preferences, ACA believes the Commission should first conduct an auction where only applicants bidding to provide the highest performance ("future-proof") broadband service participate. Should the Commission decide to establish preferences, it essential that it ensure that these preferences truly reflect differences in performance (and the investments in networks to ensure that performance). In addition, the Commission should not adopt a "negative preference" for a bidder that offers sub-standard performance (below the announced public interest requirements) to participate in the auction. Such inferior service is not only non-comparable to that provided in more urban areas, but it will disserve residents, businesses, and institutions in these eligible areas. Additionally, it will make the development of preferences more complex and potentially less equitable.

[7] Many of these providers also could be considered incumbents since they have deployed infrastructure enabling them to provide service in eligible areas.

In addition to maximizing participation, there are other reasons the Commission should provide a preference for bidders that would deploy "future proof" networks. The Commission has a statutory mandate to ensure that eligible areas have broadband service comparable to that provided in more urban areas. Because the CAF Phase II competitive bidding program lasts ten years and support is not likely to be awarded until 2017 at the earliest, this means the Commission needs to look "down the road" and recognize that by 2027 most urban areas will have some form of "future proof" networks over which gigabit speed or even higher broadband service will be provided. With respect to areas served as a result of the CAF Phase II competitive bidding process, "non-future proof" networks built in 2017 will be unable to be upgraded to provide the necessary performance characteristics in 2027 without substantial new capital investment, whereas "future proof" networks built in 2017 would only need, at most, minimal new investment going forward. The Commission should take into account the cost of supporting a network that provides lower speeds in the near term knowing that the Commission will have to invest significantly more beyond the initial term of support to upgrade the network to provide higher speeds versus the benefit of supporting a network in the near term that can provide higher speeds in the future without additional support.

Finally, ACA submits that the Commission, in establishing the framework for the competitive bidding process, should be less concerned about using limited CAF funding for deployment of "future-proof" broadband service in some areas when other areas without any broadband service may remain unserved after the auction. First, the CAF Phase II program, including the competitive bidding process, was not intended to provide support to all unserved areas. In other words, if, for instance, the price cap carriers had accepted all "right of first refusal" support, many unserved areas would remain unserved. The Commission planned to use the Remote Areas Fund to support service in most, if not all, of these remaining unserved areas. For this reason, ACA continues to support the planned development and implementation of the Remote Areas Fund to ensure unserved areas receive service. Second, so long as bidding is capped at the reserve price set by the cost model and so long as the Commission adopts ACA's other proposed measures to faciliate participation, support will be provided to at least as many areas as would be provided under the "right of first refusal" process. In addition, many consumers are likely to receive higher performance broadband service than they would receive under the "right of first refusal" process. Further, in auctions where funding is limited and bidding is competitive, support will be allocated most efficiently and should be available for more areas. What the Commission should seek to avoid, except where there is no alternative, is a competitive bidding process where support is awarded at the reserve price to provide lower performance broadband service.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules.

Sincerely,

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cc: Stephanie Weiner