

High Plains Regional Education Cooperative Comment on the Federal Communications Commission Report and Order and Further Notice of Proposed Rulemaking Released on July 14, 2014 (Federal Communications Commission Order 14 – 98)

Subject of Comment: Requirement for an Irrevocable Stand-By Original Letter of Credit

Situation

The Federal Communications Commission Order 14-98 (hereinafter referred to as the “Order”), which creates the Rural Broadband Experimental Program, requires winning bidders to submit an irrevocable stand-by original Letter of Credit (See Appendix A, Item 54). The Order states this requirement will apply to *all* winning bidders (See Appendix A, Item 65). In addition, in the case of United States banks, the Letter of Credit must be from a bank that is among the 100 largest banks in the United States (See Appendix A, Items 59 and 60).

The Order provides a basis for Tribal Nations and Tribally-Owned Applicants to apply for and receive a waiver of the Letter of Credit requirement. The justification given in the order for this waiver provision is because Tribal Nations “*are subject to various somewhat unique economic challenges*” (See Appendix A, Items 67 and 68).

In regard to the above, the High Plains Regional Education Cooperative makes the following comments:

- 1.) Item 65 and Items 67/68 are in conflict. If Tribal Nations and Tribally-Owned Applicants can apply for and receive a waiver, the letter of Credit requirement *does not apply* to *all* winning bidders.
- 2.) Most small business organizations are subject to unique economic challenges, and in many cases these economic challenges are more burdensome than those faced by Tribal Nations.
- 3.) Many small business organizations do not have an asset base sufficient to obtain a Letter of Credit from any bank; and the “100 largest banks” requirement potentially eliminates most of the small businesses that might otherwise qualify.

FCC Order 14-98 requires each organization (which is not a Tribal Nation) awarded a project in the Rural Broadband Experimental Program to provide an irrevocable stand-by original Letter of Credit. The FCC has indicated that one of the primary reasons for this requirement is to prevent waste, fraud, and abuse. However, the irrevocable stand-by original Letter of Credit requirement potentially prevents the FCC from obtaining some of the most important objectives of the Rural Broadband Experimental Program. The FCC has publically stated in both the Order and press releases that its objective is to (1) “gather valuable information about interest in deploying next generation networks in high-cost areas” and (2) they expect “these experiments to provide critical information regarding which and what types of parties are willing to build networks that will deliver services that exceed FCC current performance standards for an amount of money equal to or less than the support amounts calculated by the adopted Phase II Connect America Cost Model (See Appendix A, Items 1 and 6). There are many organizations that, while interested in the Rural Broadband Experimental Program, have decided not submit an application solely because they believe the requirement for an irrevocable stand-by original Letter of Credit is an unreasonable and burdensome requirement. This will prevent the FCC from obtaining the information referenced above from an *entire segment* of the potential provider population (those

organizations that will not submit applications because of the Letter of Credit requirement). The elimination of these providers could make the data collected invalid. An invalid database could result in complications when the FCC implements Phase II. The requirement to have an accurate database for the implementation of Phase II, outweighs the objective of possibly preventing waste, fraud, and abuse (which can occur even if Letters of Credit are given by participants). It should be noted that the FCC is implementing a Rural Broadband *Experimental* Program, and one of the experiments might be to learn about potential provider interest and program implementation if an irrevocable stand-by original Letter of Credit is not required.

In addition, the Federal Communications Commission has expressed an interest in having state, county, and municipal governments increase their participation in the Rural Broadband Experimental Program (and ultimately in the E-rate Program - See Appendix A, Items 97, 98, 99, 100, and 101). A number of states cannot provide an irrevocable stand-by original Letter of Credit, because of either constitutional and/or legislated prohibitions. Thus, the requirement for an irrevocable stand-by original Letter of Credit would prohibit some states from participating as a sponsoring entity, which is one of the objectives the Federal Communications Commission has expressed in FCC Order 14-98.

Recommendation

Provide a process for private sector businesses and state, county, and municipal governments to request and obtain a waiver that would exempt them from the requirement to provide an irrevocable stand-by original Letter of Credit.

APPENDIX A

RELEVANT SECTIONS-FEDERAL COMMUNICATIONS COMMISSION ORDER 14 – 98

Each of the items presented below has been reproduced in its entirety exactly as it was written in FCC Order 14 – 98; except that some passages have been reproduced in italics to correspond to the references made in the Situation section of the Comment.

Item 1. Today we take further steps to implement the Connect America Fund to advance the deployment of voice and broadband-capable networks in rural, high-cost areas, including extremely high cost areas, while ensuring that rural Americans benefit from the historic technology transitions that are transforming our nation’s communications services. We finalize decisions to use on a limited scale Connect America funding for rural broadband experiments in price cap areas that will deploy new, robust broadband to consumers. This Report and Order (Order) establishes a budget for these experiments and an objective, clear-cut methodology for selecting winning applications, building on the record from the Tech Transitions FNPRM. We describe the application process and announce that formal applications must be submitted by 90 days from release of the Order. We will use these rural broadband experiments to explore how to structure the Phase II competitive bidding process in price cap areas *and to gather valuable information about interest in deploying next generation networks in high-cost areas*. In the Further Notice of Proposed Rulemaking (FNPRM), we seek comment on how best to maximize the reach of our existing Connect America budget and leverage non-Federal funding to extend broadband to as many households as possible when we implement Phase II.

Item 6. We explained in the Tech Transitions Order that we must “ensure that all Americans benefit from the technology transitions, and that we gain data on the impact of technology transitions in rural areas, including Tribal lands, where residential consumers, small businesses and anchor institutions, including schools, libraries and health care providers, may not have access to advanced broadband services.” In this Order, we adopt certain parameters and requirements for the rural broadband experiments that will assist us with accomplishing these goals. *We expect these experiments to provide critical information regarding which and what types of parties are willing to build networks that will deliver services that exceed our current performance standards for an amount of money equal to or less than the support amounts calculated by the adopted Phase II Connect America Cost Model*. In addition to gathering information relevant to broader questions implicated by technology transitions, we expect these experiments also will inform key decisions that we will be making in the coming months regarding the Connect America Fund. The experiments will not delay implementation of Connect America Phase II or further reforms for rate-of-return carriers. We still expect to implement the offer of model-based support to price cap carriers in the coming months, and we will resolve how the Connect America Fund will address the challenges of providing service to the most remote, difficult to serve areas of the country. In addition, in the coming months, we expect to be considering near-term reforms for rate-of-return carriers, based on the record we will shortly receive in response to the recent Connect America Fund FNPRM, while we continue to develop a Connect America Fund for those carriers.

Item 54. Within 10 business days of public notice of winning bidders, we require all winning bidders to provide the most recent three consecutive years of audited financial statements, including balance sheets, net income, and cash flow, and to submit a description of the technology and system design used to deliver voice and broadband service, including a network diagram, which must be certified by a professional engineer. Winning bidders proposing to use wireless technologies also must provide a description of spectrum access in the areas for which the applicant seeks support. *Within 60 days of public notice of winning bidders, we require all winning bidders to submit a letter from an acceptable bank committing to issue an irrevocable stand-by original letter of credit (LOC) to that entity*. Finally,

each selected applicant is required to provide within 90 days of public notice of winning bidders appropriate documentation of its ETC designation in all the areas for which it will receive support and certify that the information submitted is accurate. Once the Bureau has determined that the entity is financially and technically qualified to receive experiment support and that the LOC commitment letter is sufficient, it will release a public notice stating that the entity is ready to be authorized for support. Within 10 business days of this public notice, we require that the winning bidder submit an irrevocable stand-by original LOC that has been issued and signed by the issuing bank along with the opinion letter from legal counsel that we describe below. Once the Universal Service Administrative Company (USAC) has verified the sufficiency of the LOC and the opinion letter, the Bureau will issue a public notice authorizing the entity to receive its first disbursement.

Item 59. Issuing Bank Eligibility. The LOCs for winning bidders must be obtained from a domestic or foreign bank meeting the requirements adopted here for purposes of the rural broadband experiments. The criteria we adopt are largely the same as the requirements the Commission adopted for Mobility Fund Phase I and Tribal Mobility Fund Phase I, although we adopt several modifications to enlarge the potential pool of eligible banks for purposes of these experiments. First, we require that for U.S. banks, *the bank must be among the 100 largest banks in the U.S.* (determined on the basis of total assets as of the end of the calendar year immediately preceding the issuance of the LOC) and must be insured by the Federal Deposit Insurance Corporation (FDIC) and for non-U.S. banks, the bank must be among the 100 largest non-U.S. banks in the world (determined on the basis of total assets as of the end of the calendar year immediately preceding the issuance of the LOC, determined on a U.S. dollar equivalent basis as of such date). We expand the pool of eligible banks from the top 50 to the top 100 banks for purposes of these rural broadband experiments because we expect the projects to be small in scale, and thus drawing on the LOC is unlikely to exhaust the assets of any bank in the top 100. We have also seen through our experience with Mobility Fund Phase I and Tribal Mobility Fund Phase I that entities have used a number of banks. Because we expect that a number of smaller entities will be winning bidders and may not have established relationships with some of the largest banks, for purposes of these experiments we find that it is beneficial to increase the number of options from which they can choose. We also require that the selected U.S. bank have a credit rating issued by Standard & Poor's of BBB- or better (or the equivalent from a nationally recognized credit rating agency). For non-U.S. banks, we require that the bank has a branch in the District of Columbia or other agreed-upon location in the United States, has a long-term unsecured credit rating issued by a widely-recognized credit rating agency that is equivalent to an BBB- or better rating by Standard & Poor's, and that it issues the LOC payable in United States dollars. By allowing banks to have a BBB- rating instead of an A- rating, we will enlarge the pool of eligible issuing banks, without significantly increasing risk to the universal service fund.

Item 60. To provide more flexibility, we also conclude that winning bidders for the rural broadband experiments may obtain a LOC from agricultural credit banks in the United States that serve rural utilities and are members of the United States Farm Credit System (which is modeled after the FDIC). We find that Farm Credit System Insurance Corporation (FCSIC) insurance provides protection that is equivalent to those indicated by holding FDIC-insured deposits. Thus, the agricultural credit bank must have its deposits insured by the FCSIC. The agricultural credit bank must also meet the other requirements that we have adopted for U.S. banks, including that they have a long-term unsecured credit rating issued by Standard & Poor's of BBB- or better (or an equivalent rating from another nationally recognized credit rating agency), and that their total assets are equal to or exceed the total assets of any of the 100 largest United States banks. This will permit rural broadband experiment recipients to obtain LOCs from, for example, CoBank, a bank with which many small rural carriers have a relationship.

Item 65. Applicability to All Winning Bidders. Our paramount objective is to establish strong

safeguards to protect against misuse of the Connect America Fund. We conclude that requiring all entities to obtain a LOC is a necessary measure to ensure that we can recover support from any recipient that cannot meet the build-out obligations and public service obligations of the rural broadband experiments. We also agree with those commenters that argue that requiring all recipients to obtain a LOC will ensure that all recipients are subject to the same default process if they do not comply with the experiments' terms and conditions.

Item 67. Tribal Nations and Tribally-Owned Applicants. Based on our experience in implementing LOCs for Mobility Fund Phase I and Tribal Mobility Fund Phase I, we recognize there may be a need for greater flexibility regarding LOCs for Tribally-owned or -controlled winning bidders. In many situations, requiring a LOC from Tribally-owned entities may be impractical because *Tribal Nations are subject to various somewhat unique economic challenges*, including the inability to levy income taxes on their citizenry and to collateralize their lands. When title to Tribal lands is vested in the United States or such lands are subject to trust restrictions against encumbrances, Tribal Nations are not in a position to provide them as collateral for such a letter of credit. We find that such situations with respect to Tribal Nations are best handled on a case-by-case basis *through the waiver process*.

Item 68. If any Tribal Nation or Tribally-owned or -controlled applicant for the rural broadband experiments is unable to obtain a LOC, it may file a petition for a waiver of the LOC requirement. Waiver applicants must show that the Tribal Nation is unable to obtain a LOC because of limitations on the ability to collateralize its real estate, that rural broadband experiment support will be used for its intended purposes, and that the funding will be used in the best interests of the Tribal Nation and will not be wasted. Tribal applicants could establish this showing by providing, for example, a clean audit, a business plan including financials, provision of financial and accounting data for review (under protective order, if requested), or other means to assure the Commission that the rural broadband experiment is a viable project. Given the number of expressions of interest filed by Tribally-owned or -controlled entities to serve areas within price cap territories, we conclude that it will be manageable to address this situation on a waiver basis if such entities become winning bidders.

Item 97. The Commission recognized in the USF/ICC Transformation Order that universal service is a shared Federal and state responsibility, and that "it is critical to our reforms' success that states remain key partners even as these programs evolve and traditional roles shift." We sought comment in the Tech Transitions FNPRM on how to leverage non-Federal governmental sources of funding for the rural broadband experiments, but did not receive a sufficient record to enable us to resolve the implementation details associated with this proposal. We remain committed to working with our state and other governmental partners to advance our mutually shared goals of preserving voice service and extending broadband-capable infrastructure to consumers across the nation. We thus wish to further explore how best to maximize the reach of our existing Connect America budget and leverage non-Federal funding to extend broadband to as many households as possible.

Item 98. *We now seek more focused comment on how to create inducements for state action to assist in the expansion of broadband.* We seek comment on providing bidding credits in the Phase II competitive bidding process that will occur after the offer of model-based support to price cap carriers in order to create incentives for states to share financial responsibility for preserving and extending broadband-capable infrastructure. In particular, we seek comment on providing a bidding credit to any bidder that is leveraging governmental support from non-Federal sources to lower the amount of funding requested from the Connect America Fund. For example, we could provide a 10 percent bidding credit in situations where an applicant has obtained a commitment from a non-Federal government entity to match Federal dollars on a four-to-one basis, and a 5 percent bidding credit an applicant has obtained a commitment to match Federal dollars on an eight-to-one basis. If we were to adopt such a bidding credit, what documentation would the bidder need to provide when submitting its bid so that the

Commission could confirm its eligibility for the bidding credit? For instance, should the bidder be required to provide a letter indicating that non-Federal funding has been authorized, contingent on the entity being a winning bidder?

Item 99. For purposes of awarding such a bidding credit, we propose to consider all forms of non-Federal assistance, including but not limited to support from a state universal service fund, state broadband authority, other state institutions that provide funding for communications infrastructure development, appropriated funds, regional and local governmental authorities, or Tribal government funding. We seek comment on this proposal.

100. In order to qualify for the bidding credit, must the matching funds be in the form of a grant, or should we also provide a credit if the bidder has a commitment for a loan from the relevant state or other non-Federal governmental authority?

101. As an alternative, should we award a bidding credit to any bidder in a state that is a net donor to the universal service fund? This would be simple to administer and would provide one means of creating greater equity between states in terms of their respective net draws from the fund. If we were to adopt such an approach, we propose to utilize the most recent Universal Service Monitoring Report to determine which states are net donors.