

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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| In the Matter of                                | ) |                      |
|   | ) |                      |
| Connect America Fund                            | ) | WC Docket No. 10-90  |
|   | ) |                      |
| Rural Digital Opportunity Fund                  | ) | WC Docket No. 19-126 |
|   | ) |                      |
| Rural Digital Opportunity Fund (Auction<br>904) | ) | AU Docket No. 20-34  |

**REPLY COMMENTS OF  
NTCA–THE RURAL BROADBAND ASSOCIATION**

NTCA–The Rural Broadband Association (“NTCA”) hereby files these Reply Comments pursuant to the Public Notice released March 5, 2024 in the above-captioned proceedings<sup>1</sup> seeking input on a letter filed by certain stakeholders proposing “amnesty” in connection with obligations under the Connect America Fund (“CAF”) Phase II and Rural Digital Opportunity Fund (“RDOF”) auctions.<sup>2</sup>

The pleadings submitted in response to the Public Notice can be roughly divided into three categories: (1) those that seek or support a blanket grant of open-ended amnesty under the theory that this will enable delivery of service to locations that certain CAF Phase II or RDOF winners are likely to abandon; (2) those that oppose any relief under the theory that the providers in question made the affirmative choice to bid for, win, and commit to serve these locations in the

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<sup>1</sup> *Connect America Fund, et al.*, WC Docket Nos. 10-90, *et al.*, Public Notice (rel. Mar. 5, 2024).

<sup>2</sup> *Ex Parte* Letter from Clay Stribling, President & CEO, Amarillo Area Foundation, *et al.*, to Chairwoman Jessica Rosenworcel, AU Docket No. 20-34, *et al.* (filed Feb. 28, 2024) (“*Stakeholder Amnesty Letter*”).

relevant auction, especially given the lack of any guarantee that these will be served through other programs; and (3) those that suggest a balanced approach to address the tension arising out of the need to serve customers that now face abandonment while promoting an efficient and effective use of broadband funding resources that does not facilitate “gaming” of funding programs.

Starting with its initial response to the *Stakeholder Amnesty Letter*,<sup>3</sup> and continuing through its comments in response to the Public Notice,<sup>4</sup> NTCA has staked out a position within the third category – and most other parties appear to adopt such a balanced perspective as well in their recent comments. As a threshold matter, the thought that a provider could hold hostage the fate of unconnected customers to press for relief from serving them is problematic, to say the least. Just a few entities argue for such an approach that would enable a provider to walk away “[r]egardless of the reason why a provider has not begun its deployment project,”<sup>5</sup> and this handful of entities further contends that *any* conditions on a grant of amnesty are unwarranted because of the purportedly “unforeseeable circumstances” that hinder certain RDOF and CAF Phase II winners from living up fully to their commitments.<sup>6</sup>

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<sup>3</sup> *Ex Parte* Letter from Michael R. Romano, Executive Vice President, NTCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, AU Docket No. 20-34, *et al.* (filed Mar. 8, 2024) (“*NTCA March 8 Letter*”).

<sup>4</sup> Comments of NTCA, WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024).

<sup>5</sup> *See, e.g.*, Comments of Next Century Cities, WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024), at 2; *see also* Comments of the Texas Rural Funders, WC Docket Nos. 10-90, *et al.* (filed Mar. 25, 2024), at 1-2; Comments of Luminare Fiber LLC and Co-Mo Comm, Inc. WC Docket Nos. 10-90, *et al.* (filed Mar. 25, 2024), at 2-3.

<sup>6</sup> Comments of the Coalition of RDOF Winners (the “RDOF Coalition”), WC Docket Nos. 10-90, *et al.* (filed Mar. 22, 2024), at 5; *see also* Comments of Mediacom Communications Corporation, WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024), at 1.

However, as the National Rural Telecommunications Cooperative (“NRTC”) accurately observes, “any penalty free amnesty sets a federal (and perhaps state) precedent that any laundry list of intervening conditions (i.e., can’t raise the funds, costs have gone up, there’s a better funding program) are sufficient to justify a default on a deployment commitment.”<sup>7</sup> Moreover, the American Association for Public Broadband (“AAPB”) clarifies that, even in originally signing onto the *Stakeholder Amnesty Letter*, it never meant to suggest unfettered amnesty, but rather intended to urge the Federal Communications Commission (the “Commission”) to “craft relief that incentivizes RDOF and CAF Phase II awards who cannot or will not build their networks to relinquish those awards” in the interest of finding alternative means to serve customers.<sup>8</sup> Likewise USTelecom highlights the balance that must be struck by “providing a substantial incentive to providers to return areas they would be unlikely to build while still ensuring they are held accountable for their decisions.”<sup>9</sup> Such perspectives appear to be shared by most in the record, including NEK Community Broadband,<sup>10</sup> the Nebraska Public Service Commission (“NPSC”),<sup>11</sup>

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<sup>7</sup> Comments of NRTC, WC Docket Nos. 10-90, *et al.* (filed Mar. 25, 2024), at 3.

<sup>8</sup> Comments of AAPB, WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024), at 2.

<sup>9</sup> Comments of USTelecom, WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024) at 2.

<sup>10</sup> Comments of NEK Community Broadband, WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024), at 1 (arguing “further protections are needed before amnesty can be granted”).

<sup>11</sup> Comments of the NPSC, WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024) at 6 (discussing “factors to determine a reduced penalty in exchange for relinquishment of CAF II and RDOF award areas during an ‘incentive period’”).

the Palmetto Broadband Coalition (“PBC”),<sup>12</sup> and GTBA-Georgia’s Rural Telephone and Broadband Association (“GTBA”).<sup>13</sup>

By contrast, arguments that macro-economic “changed circumstances” justify allowing every CAF Phase II or RDOF winner to abandon self-selected portions of their awards without consequence are unavailing. The RDOF Coalition contends, for example, that “unforeseeable” COVID-related impacts on their businesses remain so significant that the commitments they made in a 2020 auction are now incapable of being fulfilled years later.<sup>14</sup> But it is worth noting (and the RDOF Coalition pleading tellingly sidesteps) the fact that the entire world was well aware of the impacts of COVID and other factors on global supply chains by the end of 2020. Even if some of these impacts might have been relatively early-stage in late 2020, and even if RDOF bidders somehow legitimately missed or misjudged them when it came specifically to broadband industry impacts, *these parties still chose to pursue approval of their long-form applications in the face of clearer headwinds over the next two-plus years thereafter.* Indeed, these providers had countless opportunities over the course of 2021 and 2022 to pull the plug on their applications as it became increasingly apparent that broadband supply chains were constrained and inflation had increased. Yet they chose not to do so, electing instead to engage in regulatory brinksmanship over the past few years by seeking more funding to do the same thing they had already promised to do or to obtain a blanket grant of amnesty in not doing so<sup>15</sup> – all while leaving affected customers hanging

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<sup>12</sup> Comments of the PBC, WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024), at 2.

<sup>13</sup> Comments of GTBA, WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024) at 12-15 (supporting “a waiver approach” for individualized review of each request for amnesty and consideration of how to grant any relief).

<sup>14</sup> RDOF Coalition Comments, at 4-8.

<sup>15</sup> *See* Petition of the RDOF Coalition, WC Docket Nos. 10-90, *et al.* (filed Aug. 16, 2023).

in the balance. Moreover, there has been no showing of how any *individual provider* has been affected by these ostensibly changed circumstances such that relief is warranted; in fact, to this day, no one outside the coalition knows who is in the coalition, never mind how the changed circumstances in question allegedly affected each of them. The public interest surely cannot be met by granting blanket amnesty to unidentified entities with no examination whatsoever of whether and to what degree the macro-economic conditions cited as concerns affected each entity's individual ability to perform as previously promised.

Of perhaps even greater concern is the notion that these parties would be given the *choice* of which parts of their otherwise committed projects to scrap. Presumably inflationary pressures and other supply chain impacts have hit these providers (and others too) across the board, and not simply for a subset of locations. Yet these providers are not seeking to turn back in *all* of their locations, but rather to abandon certain portions of their auction wins while continuing to serve others at their own choosing and design. Of course, since the individual RDOF Coalition members remain anonymous, it is impossible to discern how abandonment of given locations would affect their auction wins overall—but this is the very point. If given *carte blanche* capability to surrender self-selected locations, and if their motivation is truly driven by economic pressures, it is all but certain that these parties would turn back their most costly-to-serve locations and retain the relatively more lucrative portions of the areas won. As NEK Community Broadband notes, there is concern already that some states “do not have sufficient funds as it is in order to fully fund the buildout of the broadband infrastructure to every unserved or underserved address.”<sup>16</sup> To compound such concerns through a blanket grant of amnesty to an anonymous group of providers

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<sup>16</sup> NEK Community Broadband Comments, at 1-2.

based upon a generalized set of allegations for an unidentified subset of locations that are in all likelihood the hardest to serve would undermine, rather than promote, the goal of delivering “Internet for All.” Moreover, such an outcome would represent bad public policy by effectively allowing individual providers to convert a mechanism that is ostensibly designed to promote “universal service” into an exercise in self-defined *post hoc* “cream-skimming” that enables them to sweep up as many locations as possible initially before “throwing back” the ones they wish not to serve after all.<sup>17</sup>

This being said, there is substantial recognition in the record that limited relief might be warranted – if structured thoughtfully – to help ensure that Americans are not left stranded by entities that have no intentions of fulfilling their obligations. NTCA certainly shares the concerns of parties like the Advanced Communications Law & Policy Institute (“ACLP”) and the National Rural Electric Cooperative Association (“NRECA”) who note that granting amnesty could lead to the need “to address a range of questions about fairness, equity, and due process”<sup>18</sup> and undermine “the integrity of the RDOF, CAF II, and any future [universal service fund] auction or support programs.”<sup>19</sup> But, as noted above, the unfortunate fact is that the goal of universal service is at risk if unserved Americans are left at the mercy of known and obvious default risks. In this regard,

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<sup>17</sup> Indeed, as NTCA noted previously, if the Commission is not careful in designing any relief granted and simply applies a *pro rata* reduction to support across an auction award, this self-selection could result in an effective cross-subsidy in which parties obtaining amnesty retain some portion of the support associated with the higher cost locations even as they decline to serve them and commit to follow through only with serving their lower-cost areas. *See* NTCA Comments, at 4. It will therefore be essential to ensure the calculation of any penalties, even if reduced, takes into account the relative cost characteristics of the areas being returned as compared to those being retained in order to avoid a potential windfall for any given party seeking relief.

<sup>18</sup> Comments of ACLP, WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024), at 3.

<sup>19</sup> Comments of NRECA, WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024), at 4.

the record reflects strong support for limited conditional waivers subject to close scrutiny along the lines of those suggested by NTCA in its initial letter. More specifically, NTCA highlights again three conditions on “amnesty” that appear to have widespread support in the record, even if the details of how to implement them may differ slightly as suggested by various parties:

**“Early Buyout” Liability** – Several parties highlight the importance of ensuring a balance between encouraging parties to return locations that they have no interest or capability at this point to serve and applying penalties that do not create perverse incentives or poor precedent for future programs.<sup>20</sup> In its initial comments, NTCA suggested leveraging, but modifying, the liability that would apply for failures to execute the final milestones for deployment to the locations being abandoned.<sup>21</sup> Other parties support such a balanced approach; for example, USTelecom makes a similar suggestion, with slight differences in calculating somewhat reduced penalties for failure to have completed the deployment promised.<sup>22</sup> Likewise, the NPSC suggests a modified forfeiture schedule to apply “a reduced penalty in exchange for relinquished CAF II and RDOF award areas” during a brief window.<sup>23</sup> Although these recommendations differ slightly in exact form and calculation, their fundamental thrust is consistent – that it is necessary, and it would be appropriate, for the Commission to fashion a penalty structure that does not deter parties from returning locations that they will not serve but that ensures these providers are not the beneficiaries of a “get out of jail free” card.

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<sup>20</sup> See, e.g., AAPB Comments at 2; GTBA Comments at 15-16.

<sup>21</sup> NTCA Comments, at 3-4.

<sup>22</sup> USTelecom Comments at 5-6.

<sup>23</sup> NPSC Comments at 6-7.

**Precluding New Applications to Serve the Same Locations** – Like NTCA,<sup>24</sup> many parties urge the Commission to foreclose opportunities for “gaming” by abandoning locations in the CAF Phase II and RDOF programs only to chase funding to serve the same locations through the Broadband Equity, Access, and Deployment (“BEAD”) or other future grant programs. The Irby entities, for example, advocate for conditioning any grant of relief from serving RDOF or CAF Phase II locations upon barring that entity “from seeking grant funding from other programs, federal or state, to serve those locations.”<sup>25</sup> Likewise, the ACLP cautions that hopping from funding program to funding program in pursuit of better economics “should not be allowed because it would constitute permission to engage in arbitrage, the outcome of which will likely be the continued absence of broadband in some areas.”<sup>26</sup>

In an internally inconsistent attempt to argue against such measures, Mediacom argues on the one hand that program-hopping should not be precluded, while at the same time claiming that there is “no risk” that any party would have an incentive to do so anyway.<sup>27</sup> If the latter is true, then Mediacom should have no practical concern with such preclusion. Mediacom further tucks into a footnote a half-hearted attempt to assert that the Commission can only bar participation in its own programs and lacks authority to preclude parties from seeking other funding.<sup>28</sup> This argument misses the point altogether; the parties that want amnesty are currently bound by

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<sup>24</sup> NTCA Comments, at 4-5.

<sup>25</sup> Comments of Irby Utilities, *et al.* (“Irby”), WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024), at 5-6.

<sup>26</sup> ACLP Comments, at 5.

<sup>27</sup> Mediacom Comments, at 9-10.

<sup>28</sup> *Id.* at n. 22.



Commission rules – there is no entitlement to relief. It is well within the Commission’s authority to condition any relief upon certain requirements, and it is also well within the Commission’s authority to define the terms and conditions that apply to universal service support. Thus, if a party wants to escape from universal service obligations owed to certain customers, and if that party further wants to continue to receive support for the *other* locations that it has chosen not to abandon, the Commission stands on solid legal ground in conditioning such relief and the provision of ongoing support on preclusion from seeking other funding for abandoned locations.

**Transparent, Fact-Driven Processes** – Finally, and perhaps most importantly, a transparent process that enables review of facts applicable to individual requests for relief would be essential to serve the public interest.<sup>29</sup> The Illinois Office of Broadband (“IOB”) highlights the need for such process, noting that “absent much more detailed information . . . the IOB believes that that the requested relief would substantially harm the goals of the BEAD Program by expanding the number of locations requiring BEAD support with no commensurate increase in BEAD funding.”<sup>30</sup> Other comments similarly underscore the need to understand more clearly the scope of potential CAF Phase II and RDOF locations at issue and how their return could affect the public interest generally and BEAD goals more specifically.<sup>31</sup> To be clear, this is not to contend

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<sup>29</sup> NTCA Comments, at 3-4.

<sup>30</sup> Comments of the IOB, WC Docket Nos. 10-90, *et al.* (filed Mar. 26, 2024), at 2. Of course, the situation in any given case could be even worse than the IOB posits, to the extent that the locations that amnesty seekers choose to return are primarily those that are relatively higher cost to serve.

<sup>31</sup> *See, e.g.*, AAPB Comments, at 3 (discussing a conversation with one state official fearing that the return of locations could adversely affect the implementation of BEAD); NEK Broadband Comments, at 1 (raising concerns about the wherewithal of states that already face challenges in achieving BEAD goals); PBC Comments, at 3 (noting the need for “verification” in examining which locations are being returned); Irby Comments, at 3 (describing the process by which waiver requests should be considered).

that the Commission should deny altogether any opportunity to return locations won in the CAF Phase II or RDOF auctions; rather, it is simply to say that this should be neither a grant of blanket amnesty nor a rubber stamp. The public interest necessitates more careful and transparent review of individual requests for waiver before any relief is granted.<sup>32</sup>

For the foregoing reasons, NTCA recommends that the Commission craft any relief granted in a manner consistent with the recommendations in the *NTCA March 8 Letter*, its initial comments regarding this Public Notice, and these reply comments.

Respectfully submitted,



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<sup>32</sup> Another option for potential consideration in lieu of abandoning locations in the hope that the BEAD program might absorb them could be to permit auction winners to seek expedited approval from the Commission during a time-limited window to assign their CAF Phase II or RDOF obligations and corresponding support for certain locations to other willing and qualified unaffiliated parties for fulfillment. But even this pathway – while expedited – would still require some review and some level of assurance of performance by the assignee; for example, to ensure sufficient qualifications and capability to fulfill the obligations, the Commission should ensure that the proposed assignee is already an eligible telecommunications carrier for the state in question and previously obtained approval of a long-form application in the same auction in which the locations at issue were awarded (even if that application was of course for different areas in the same state).