Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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	)	AU Docket No. 20-34

To: The Commission

COMMENTS OF
THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

The National Rural Electric Cooperative Association ("NRECA") hereby submits its Comments opposing the amnesty request put forward in the letter dated February 28, 2024 from 69 Internet Service Providers, Trade Associations, State and Local Officials, School Districts, Unions and Civil Society Organizations for which the Wireline Competition Bureau has sought comment in its March 5, 2024 *Public Notice.*[1]

The letter requests that the Commission provide Rural Digital Opportunity Fund (RDOF) and Connect America Fund (CAF II) awardees who "cannot or do not intend to build their networks" a "very short and expedited amnesty period" that allows them to relinquish their winning areas without being penalized to the "full extent" of the Commission's rules.[2]

[1] DA 24-202.
[2] *See* Letter from 69 Internet Service Providers, Trade Associations, State and Local Officials, School Districts, Unions, and Civil Society Organizations, to Jessica Rosenworcel, Chairwoman, Federal Communications Commission, WC Docket Nos. 10-90, 19-126, AU Docket No. 20-34 (filed Feb. 28, 2024), https://www.fcc.gov/ecfs/document/1022830318048/1

INTRODUCTION

NRECA shares the concern raised in the letter about RDOF and CAF II awardees that "cannot or do not intend to build their networks" but we disagree with the proposed remedy. While NRECA fully acknowledges that there have been awardees that have defaulted due to unforeseeable circumstances beyond their control,[3] and that even more defaults will occur as the first milestone deadline grows closer, we remain strongly opposed to penalty-free RDOF and CAF II amnesty for the following reasons. First and foremost the broken commitments made to rural communities most in need of the service they were promised and relied on, not to mention the resultant economic impact of losing that long awaited service; the patent unfairness to other rural providers who were willing, prepared and able to build per program rules, yet in many cases lost out to gamesmanship illustrated by underbidding or those irresponsibly unprepared (financially and operationally) to undertake a proper buildout effort; and the dangerous and disruptive precedent bailing out defaulting entities would set for future auctions and grant programs.

It is important that the Commission recognizes the problematic timing of this proceeding. As the FCC and the authors well know, the Broadband Equity, Access, and Deployment (BEAD) program is well underway, making it difficult for new locations to be made eligible for BEAD funding at this juncture. Further, as an organization for more than 900 not-for-profit rural electric cooperatives serving 327 of the Nation's 353 "persistent poverty counties," as well as responsible for providing reliable, affordable electric service to some of the lowest density, hardest-to-reach parts of the country, we are acutely aware of the high-costs, logistical issues, and on the ground planning necessary for successful infrastructure deployment.

[3] Causes of unforeseen costs increases are well documented and include historic levels of inflation, supply chain problems and workforce shortages. Such challenges were particularly difficult for smaller entities, such as electric cooperatives. In some cases, electric cooperative awardees won isolated or a checkerboard of CBGs greatly complicating the business plan making it uneconomic.

COMMENTS

I. Granting a Brief Amnesty Would Establish a Dangerous Precedent

In their relief request letter, a coalition of interested parties made the case that RDOF and CAF II awardees who are now in the position of being either unable or perhaps simply unwilling to meet the program commitments they made to the Commission and should be free from any liability incurred with award abdication. Further, the letter requests that awardees be relieved from "having to bear the full weight of penalties that the law allows."[4]

NRECA contends that to grant partial amnesty with either reduced or no penalties would effectively set a dangerous federal (and perhaps even state) precedent that any excuse would be sufficient to default on commitments made to rural households, and act as an impediment to the longstanding goal of closing the digital divide. Further, during the application period, between financial analysis and operational planning, every recipient possessed the opportunity to default without penalty, but they did not.

We fully acknowledge the difficulty for the Commission, or any agency, to differentiate between a bad actor who gamed the reverse auction from a good faith effort by an RDOF or a CAF II awardee that had the best intention to serve its area but was not able to meet its obligations due to unforeseen circumstances beyond its control. Some of our own electric cooperative members were forced to default on some census block groups in recent months due to the historic inflation and other mitigating factors that made the obligation not financially viable.[5] Regardless, to

[4] See Letter from 69 Internet Service Providers, Trade Associations, State and Local Officials, School Districts, Unions, and Civil Society Organizations to Jessica Rosenworcel, Chairwoman, Federal Communications Commission, WC Docket Nos. 10-90, 19-126, AU Docket No. 20-34 (filed Feb. 28, 2024).
[5] See Footnote 3.

maintain the integrity of the RDOF, CAF II and any future USF auction or support program, the certification and due diligence requirements set forth in the Commission's rules must be upheld.[6]

Unfortunately, rather than considering the true cost of reaching high-cost, low-density, and hard-to-reach parts of the country that all providers recognize as expensive and difficult to serve, the RDOF reverse auction format instead incentivized some providers to undercut themselves and others who may have been willing to provide service in order to win the award. Oftentimes, these bids fell in the range of 10-to-30 percent (sometimes even lower) of the reserve prices that the Commission's cost model determined was necessary to construct and operate the broadband networks in question. A significant number of rural electric co-ops who were prepared and committed to serving their members with reliable broadband service were simply underbid. As a result of the unreasonably low bids placed by some providers, many are now unable to afford to build and operate their proposed networks, and the Commission is now faced with breaking its promise of connectivity in some areas and returning previously covered communities to the category of "unserved."

To give participants a "get out of jail free" card in the form of amnesty (no matter how abbreviated) and/or reduced fines would send a dangerous, ill-advised signal to internet service providers that default is readily acceptable option regardless of the consequences to the communities left behind. Granting amnesty will not deter future defaults but will have the opposite effect. Rather than encouraging thoughtful participation from internet service providers in federal broadband programs moving forward, amnesty would only encourage bad actors to game future broadband auctions and support programs, not only undermining the goals of the programs but

[6] The applicant acknowledges that it has sole responsibility for investigating and evaluating all technical and marketplace factors that may have a bearing on the level of [RDOF] support it submits as a bid, and that if the applicant wins support, it will be able to build and operate facilities in accordance with the [RDOF] obligations and the Commission's rules generally. Auction 904 *Public Notice, para 133.*

wasting millions in taxpayer funds and ultimately leaving unconnected communities and families behind. Additionally, to employ a penalty-free amnesty program at this late juncture will expose the Commission to litigation from those awardees who have already returned awards and incurred significant penalties.

II. The Time for Amnesty to Have a Positive Effect on BEAD has Passed

In their letter, the amnesty proponents contend that lowering default penalties will incentivize relinquishment of their respective areas sooner, thereby making them eligible for BEAD funding. In advocating for quick relief, they assert that "the states will be able to include communities that are currently unserved or underserved but are not included [on the final BEAD eligibility map] because of unfulfilled RDOF and CAF II commitments."[7] NRECA respectfully disagrees with this optimistic forecast. Most state Volume One plans have been approved by NTIA and over half of States have begun or completed their challenge process to determine location eligibility.

Any attempt at incentivizing RDOF and CAF II awardees to default on their awards should have been prior to the July 2023, allocation of the BEAD dollars among the states. However, that time has long passed. State allocations were calculated based on the RDOF and CAF II areas being deemed served, and ineligible to receive additional federal funds due to the enforceable federal funding commitment in those areas. To go back to states and say they must now stretch their limited BEAD dollars to include a currently unknown number of additional locations is unfair to the states,[8] the potential ISP applicants, and the communities that are relying on BEAD, RDOF, or CAF II to bring them broadband service.[9] While BEAD is the last and largest pot of

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[7] See note 3 at p. 3.

[8] See, Linda Hardesty, "RDOF defaulters hinder state BEAD programs, *Fierce Telecom*, March 15, 2024, https://www.fiercetelecom.com/broadband/rdof-defaulters-hinder-state-bead-programs; and, Julia King, "New Mexico, Minnesota latest to say BEAD funds won't be enough," *Fierce Telecom*, August 10, 2023, https://www.fiercetelecom.com/broadband/new-mexico-minnesota-latest-say-bead-funds-wont-be-enough.

[9] The Commission is best positioned to predict the number of CBGs and locations that may be defaulted on if amnesty is granted. While amnesty is unfair in our opinion, the Commission could undertake an evaluation of

funding available to assist with the cost of rural broadband deployment, these unfortunate communities have already lost out on potential funding through the U.S. Treasury's Capital Projects Fund (CPF), and USDA's ReConnect program, among others, while RDOF and CAF II awardees have sat on their hands.

We agree with the authors' sentiment that the promise in the Infrastructure Investment and Jobs Act (IIJA) that every household in the U.S. be connected to robust and affordable broadband "won't be fulfilled if communities that are penalized through no fault of their own remain ineligible for BEAD-funded networks."[10] Making RDOF and CAF II defaulted areas eligible for BEAD funding is a laudable goal. In our estimation however, the time for such a pivot has passed.

III. Preventing Future Defaults/Foregoing Reverse Auctions

Lastly, NRECA would like to offer some suggestions to ensure not only that such defaults are avoided in the future, but also that future high-cost program rollouts, such as RDOF phase II, do not suffer the same fate but new and improved program rules and processes are implemented.

NRECA recommends the use of reverse auctions to award funding in high-cost areas be discontinued. As evidenced by the request under consideration, reverse auctions force companies to undercut themselves to obtain an award, which in many cases does not truly reflect the cost to deploy nor does it provide reliable and affordable access in unserved areas. Some providers have often bid impossibly low as a way to block a competitor from receiving funding to serve that

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progress by CAF II and RDOF builds to date utilizing the HUBB database and publicly release data on the progress in meeting program obligations. This would at least provide states, NTIA and stakeholders with an estimate of the potential increase in the number of unserved locations that states would have to accommodate in their BEAD budget and plans.

[10] *supra* note 4 at 3.

area, and small, local providers can be disadvantaged due to the lack of resources enjoyed by larger competitors. This method for funding allocation is likely to continue to disappoint in delivering realistic network deployment in high-cost rural areas, as RDOF and CAF II buildout milestone dates get closer.

We respectfully urge for greater due diligence and vetting on the front end of the application process. RDOF Phase I highlighted many unqualified providers or inadequate technologies that were allowed to participate in the auction, many of whom were later disqualified or had to default. The FCC's approach to choosing to fully vet RDOF bidders after they were initially awarded funds and when the longform application was submitted unquestionably contributed to the unprecedented number of defaults. Prior to moving forward with any RDOF Phase II, additional upfront scrutiny should be placed on the technologies employed as well as the financial and operational capabilities of participating providers to ensure that those receiving federal support can deploy and maintain lasting, scalable broadband networks.[11]

Finally, rather than focusing on a reduced penalty structure, higher fines for defaults or noncompliance should be put in place before an RDOF Phase II process begins. This would help to weed out bad actors or entities with no intent to serve high-cost areas. The level of fines failed to prevent the aforementioned gamesmanship in some areas, with some providers preferring to default rather than allow access to a competitor. Increasing fines on providers who do not meet their obligations would force more thoughtful participation in federal programs and a more realistic assumption of project completion. While it will take years to fully determine the how

[11] Jake Neenan, "FCC Proposes $22 Million Fine Against LTD over RDOF," *Broadband Breakfast*, December 11, 2023, https://broadbandbreakfast.com/fcc-proposes-22-million-fine-against-ltd-over-rdof/#:~:text=By%20defaulting%20on%20its%20bid,areas%20in%20the%20United%20States.%E2%80%9D.

many RDOF awarded areas will receive the service promised, higher fines as well as fines that escalate the longer it takes for an awardee to default could add guard rails to federal funding programs and help ensure program integrity. Assessing penalties increasing commensurate with the volume of the awarded areas returned would also deter bad actors.

IV. CONCLUSION

For the foregoing reasons, NRECA urges the Commission to reject the authors' request for brief amnesty and for a reduced default penalty for RDOF and CAF II awardees. NRECA disagrees that the abandoned rural communities can simply be absorbed into BEAD with states well on the way toward implementing their plans. Most state Volume One plans have been approved by NTIA and over half of states have begun or completed their challenge process to determine location eligibility. As an association that represents hundreds of members committed to building broadband in their rural, high-cost communities, we feel that is critical for the Commission to stay the course to ensure integrity in the future, and focus on improving accountability, not only for RDOF and CAF II but any other programs aiming to bridge the digital divide.

Rural Electric Cooperative Association

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