

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

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

**COMMENTS OF THE FREE STATE FOUNDATION  
ON LETTER FROM 69 INTERNET SERVICE PROVIDERS,  
TRADE ASSOCIATIONS, STATE AND LOCAL OFFICIALS,  
SCHOOL DISTRICTS, UNIONS, AND CIVIL SOCIETY ORGANIZATIONS\***

These comments are filed in response to a Public Notice released by the Wireline Competition Bureau (WCB) on March 5, 2024, soliciting feedback on a request to open a so-called "amnesty" window during which recipients of government subsidies could back out of their commitments to construct broadband infrastructure without meaningful consequence.<sup>1</sup> Granting this request would further delay the connection of unserved households. It would unjustly favor certain auction participants – a privileged group that seemingly includes government-owned and government-affiliated networks already unduly advantaged by their government status – over others. And by creating a classic "moral hazard," it would encourage irresponsible behavior that threatens the efficacy of reverse auctions generally. The WCB therefore must deny this request.

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\* These comments express the views of Randolph J. May, President of the Free State Foundation, and Andrew Long, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

<sup>1</sup> See generally Public Notice, "Wireline Competition Bureau Seeks Comment on Letter Seeking RDOF and CAF II Amnesty from 69 Internet Service Providers, Trade Associations, State and Local Officials, School Districts, Unions, and Civil Society Organizations," WC Docket Nos. 10-90 and 19-126, AU Docket No. 20-34, DA 24-202 (March 5, 2024) (*Public Notice*).

In August 2023, an anonymous group of Rural Digital Opportunity Fund (RDOF) reverse-auction subsidy recipients – the "Coalition of RDOF Winners" – sought extraordinary relief, in a variety of forms, from enforceable commitments to which they voluntarily and knowingly agreed when electing to participate in this Commission-run subsidy program.<sup>2</sup>

Then, on February 28, 2024, a debatably sympathetic cast of characters – that is, the 69 Internet Service Providers, trade associations, state and local officials, school districts, unions, and civil society organizations that the WCB's instructions require us to spotlight in the caption of this submission<sup>3</sup> – weighed in on their behalf with respect to one specific ask: the establishment of "a very short and expedited amnesty period of no more than a month that allows them to relinquish all or part of their winning areas without being penalized to the full extent that the Commission's rules provide" that would be available to RDOF and Connect America Fund (CAF) II "awardees who cannot *or do not intend to* build their networks" (emphasis added).<sup>4</sup>

In substantively similar letters to Senators Wicker, Hyde-Smith, and Vance dated June 26, 2023,<sup>5</sup> FCC Chairwoman Jessica Rosenworcel wrote that "when the Commission set up [the

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<sup>2</sup> See generally Coalition of RDOF Winners Emergency Petition, WC Docket Nos. 10-90 and 19-126, AU Docket No. 20-34 (filed August 16, 2023), available at <https://www.fcc.gov/ecfs/document/108162898622642/1> (*Emergency Petition*).

<sup>3</sup> See *Public Notice* at 1 ("All filings must refer to Letter From 69 Internet Service Providers, Trade Associations, State and Local Officials, School Districts, Unions, and Civil Society Organizations....").

<sup>4</sup> *Id.* at 1. See also *ex parte* 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 and 19-126, AU Docket No. 20-34 (filed February 28, 2024), available at <https://www.fcc.gov/ecfs/document/1022830318048/1> (*Amnesty Letter*) ("On August 16, 2023, an Emergency Petition filed by RDOF winners requested, *among other things that should also be considered*, a brief amnesty period that would allow them to relinquish their awards without having to bear the full weight of penalties that the law allows. The undersigned ask that the FCC grant that request (including extending it to CAF II awardees)....") (emphasis added). In their comments, the Coalition of RDOF Winners reiterates its requests for broader relief, including additional funding. See Comments of the Coalition of RDOF Winners on Letter from 69 Internet Service Providers, Trade Associations, State and Local Officials, School Districts, Unions, and Civil Society Organizations, WC Docket Nos. 10-90 and 19-126, AU Docket No. 20-34 (filed March 22, 2024), available at <https://www.fcc.gov/ecfs/document/10322198528904/1>, at 2 ("As a preliminary matter, the RDOF Winners emphasize that in their Emergency Petition, the primary form of relief requested was for (1) supplemental funding, (2) letter of credit relief, and (3) making RDOF payments for years 7-10 access in year 2 ....").

<sup>5</sup> See Chairwoman Rosenworcel's Response to Members of Congress Regarding the Rural Digital Opportunity Fund (July 12, 2023), available at <https://docs.fcc.gov/public/attachments/DOC-395063A2.pdf>.

RDOF], it set rules of the road *to ensure that winning bidders would fulfill their promise* to use this funding to build new broadband infrastructure. The Commission's default rules are designed *to impress upon recipients the importance of being prepared to meet all Commission requirements and be prepared to fulfill deployment obligations.*"<sup>6</sup>

In other words, the default rules exist to hold bidders' feet to the fire and incentivize them to build the networks for which they received subsidies – subsidies which were denied to losing bidders. But if the Commission instead were to excuse certain RDOF and CAF II reverse-auction winners from suffering the agreed-to consequences of their failure to follow through on their commitments, several undesirable outcomes would result.

One, efforts to close digital divides would be delayed. The *Amnesty Letter* suggests that the unserved might be better off if Broadband Equity, Access, and Deployment (BEAD) Program subsidies instead were used to connect their locations.<sup>7</sup> But as the *Amnesty Letter* concedes, the BEAD Program is months away from allocating funding.<sup>8</sup> By contrast, Universal Service Fund money allocated through the RDOF and CAF II mechanisms already have been disbursed.

Two, as the *Amnesty Letter* acknowledges, "a number of RDOF awardees have already defaulted and may have paid stiff penalties for doing so."<sup>9</sup> It would be unjust and arbitrary to treat the members of the Coalition of RDOF Winners differently solely because 69 seemingly

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<sup>6</sup> *Id.* at 2.

<sup>7</sup> *See, e.g., Amnesty Letter* at 1-2 (stating that the BEAD Program "will provide US states and territories the resources to deploy broadband in unserved and underserved communities" and that "[s]ignificantly lowering the penalties for default will incentivize awardees to relinquish their areas sooner rather than later, making the areas eligible for BEAD funding"). *See also Emergency Petition* at 12-13 ("Moreover, if a short amnesty window is provided on an expedited basis, any RDOF winning areas permitted to be relinquished could be made eligible for the NTIA BEAD program before it is too late for that to happen.") (citations omitted).

<sup>8</sup> *See id.* at 3 ("Most states will begin their BEAD mapping challenge process in the first half of this year, and that process will determine the final map by which the states will allocate BEAD funding.").

<sup>9</sup> *Id.* at 2.

avored entities advocated on their behalf. And some of those seeking amnesty appear to be government-owned networks that already enjoy government-bestowed benefits not available to their private sector competitors.

Three, the creation of the requested amnesty window would undermine future reverse auctions by opening the door to unwanted and inefficient "moral hazard" scenarios wherein the risk faced by bidders contemplating default is too low. By design, the threat of meaningful default penalties discourages gamesmanship and chicanery – and encourages actual performance (that is, the desired construction of broadband infrastructure in areas presently unserved). As WTA – Advocates for Rural Broadband explained in its opposition to the *Emergency Petition* itself, the FCC "must strictly enforce its auction rules, terms and conditions and deny retroactive waivers thereof in order to prevent the integrity of such reverse auctions and their intended service goals from being subverted by either reckless and irresponsible bidding or deliberate gaming tactics."<sup>10</sup>

In this regard, the suggestion in the *Amnesty Letter* that, in the unfortunate event that the WCB does grant the relief sought, RDOF and CAF II winning bidders that avail themselves of a consequence-free default window might be allowed to receive BEAD Program subsidies with respect to the same locations must be firmly rejected.<sup>11</sup>

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<sup>10</sup> WTA – Advocates for Rural Broadband Opposition to Emergency Petition of the Coalition of RDOF Winners, WC Docket Nos. 10-90 and 19-126, AU Docket No. 20-34 (filed August 30, 2023), available at <https://www.fcc.gov/ecfs/document/1083062329457/1>. *See also id.* at 1 ("The principal issue herein is the preservation of the integrity of the RDOF Auction as well as the protection of the integrity and viability of any future Commission reverse auctions.").

<sup>11</sup> *See Amnesty Letter* at 2 n.4 ("Should an RDOF or CAF II awardee relinquish under the recommended amnesty program, NTIA or the state broadband office could then decide whether those ISPs would be eligible for BEAD funding in those areas.") *Cf.* NTCA–The Rural Broadband Association *ex parte* letter, WC Docket Nos. 10-90 and 19-126, AU Docket No. 20-34 (filed March 8, 2024), available at <https://www.fcc.gov/ecfs/document/10308762312167/1>, at 1 (arguing that "the Commission should at the very least impose ... a bar upon the same party or its affiliates or subsidiaries seeking grant funding thereafter to serve those same locations").

The worthy goal of reverse auctions like RDOF and CAF II is to put limited financial resources to their highest and best use: rival providers vie with one another to obtain subsidies by committing to build broadband networks in unserved areas at the lowest overall cost. Penalties for default are essential to the integrity of this funding model, as they create the necessary incentives for winning bidders to do what they promise to do – and the necessary disincentives to discourage gamesmanship that harm not just rivals, but also Americans on the wrong side of digital divides who are harmed when broadband network construction does not occur. The WCB therefore should deny this request to open a consequence-free invitation to default.

Respectfully submitted,

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