

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Rural Digital Opportunity Fund	)	WC Docket No. 19-126
	)	
Connect America Fund	)	WC Docket No. 10-90

**ORDER**

**Adopted: June 25, 2020**

**Released: June 25, 2020**

By the Chief, Wireline Competition Bureau:

**I. INTRODUCTION**

1. In this Order, the Wireline Competition Bureau (Bureau), in conjunction with the Rural Broadband Auctions Task Force and the Office of Economics and Analytics, resolves a petition filed by Charter Communications, Inc. (Charter) seeking waiver of section 54.802(a) of the Commission’s rules establishing census block eligibility criteria for Phase I of the Rural Digital Opportunity Fund auction.<sup>1</sup> Specifically, Charter requests that the Bureau remove 2,127 census blocks from the Commission’s eligible areas list for the Rural Digital Opportunity Fund auction because Charter has deployed or will soon deploy service to these blocks under a settlement agreement with the State of New York.<sup>2</sup> Based on the record before us including that Charter already has begun deploying service of at least 300/10 Mbps to 11,091 residences and businesses located within these 2,127 census blocks,<sup>3</sup> we find good cause to waive the rule and, accordingly, grant the petition.

**II. BACKGROUND**

2. As part of the continuing efforts to close the digital divide for all Americans, the Commission recently adopted rules for the Rural Digital Opportunity Fund, allocating up to \$20.4 billion through a two-phase competitive auction to help connect millions of unserved rural homes and small businesses to high-speed broadband.<sup>4</sup> Phase I of the Rural Digital Opportunity Fund (Auction 904) will provide up to \$16 billion to target areas that current data indicate are unserved, including nearly six million unserved rural homes and businesses.<sup>5</sup> Phase I will more than double the minimum speeds the Commission required in the Connect America Fund Phase II auction to 25/3 Mbps and use weights to compare bids for the different performance tiers and latency combinations, with support awarded to the bidder offering the best-performing network once the total price of all bids falls below the auction’s budget.<sup>6</sup> The Phase I auction is scheduled to commence on October 29, 2020.<sup>7</sup>

<sup>1</sup> Petition for Waiver of Charter Communications, Inc., WC Docket Nos. 19-126, 10-90 (Apr. 10, 2020) (Charter Petition). See also 47 CFR § 54.802(a).

<sup>2</sup> Charter Petition at 1.

<sup>3</sup> *Id.* at 3-4.

<sup>4</sup> See *Rural Digital Opportunity Fund; Connect America Fund*, WC Docket Nos. 19-126, 10-90, Report and Order, 35 FCC Rcd 686 (2020) (*Rural Digital Opportunity Fund Order*).

<sup>5</sup> *Id.* at 689-90, para. 8.

3. In the *Rural Digital Opportunity Fund Order*, the Commission determined that support would be available only to specific eligible census blocks,<sup>8</sup> and would be targeted to areas where broadband-capable networks were unlikely to be deployed absent Rural Digital Opportunity Fund support and to avoid inefficient use of limited taxpayer resources.<sup>9</sup> Such an approach is consistent with the Commission's universal service policy of ensuring that support is not provided to overbuild areas where another provider already is providing voice and broadband service meeting the Commission's requirements.<sup>10</sup> To identify the preliminary eligible areas, the Commission directed the Wireline Competition Bureau (Bureau) to use the Connect America Cost Model (CAM) using the most recent publicly available FCC Form 477 data to identify census blocks that were unserved with broadband at speeds of at least 25/3 Mbps.<sup>11</sup>

4. On March 17, 2020, the Bureau released an initial list of nearly 858,000 census blocks deemed initially eligible for the Phase I auction.<sup>12</sup> Based on June 30, 2019 FCC Form 477 data, the preliminary list includes census blocks located in price cap carrier territories that are not served by the incumbent price cap carrier or an unsubsidized competitor with voice and broadband at speeds of 25/3 Mbps or higher and that fall into one of six specific categories.<sup>13</sup> The Bureau also conducted a limited challenge process to give parties an opportunity to identify, by April 10, 2020, census blocks that had been served with voice and 25/3 Mbps or better broadband services since June 30, 2019; had been awarded funding by a federal or state broadband subsidy; or where rate-of-return carriers did not expect to extend broadband in satisfaction of their deployment obligations.<sup>14</sup> The Bureau also will release the final list of eligible blocks prior to the short-form application deadline.<sup>15</sup>

5. In its petition, Charter stated that it has entered into a settlement agreement with the New York Public Service Commission and New York Department of Public Service to deploy high-speed broadband service to 145,000 residences and businesses across New York State.<sup>16</sup> As part of its

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<sup>6</sup> *Id.* at 702-07, paras. 31-41.

<sup>7</sup> See *Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020; Notice and Filing Requirements and Other Procedures for Auction 904*, AU Docket No. 20-34, WC Docket Nos. 19-126, 10-90, Public Notice, FCC 20-77, at para. 10 (rel. June 11, 2020).

<sup>8</sup> *Rural Digital Opportunity Fund Order*, 35 FCC Rcd at 702, para. 30.

<sup>9</sup> *Id.* at 692, para. 13.

<sup>10</sup> *Connect America Fund et al.*, WC Docket No 10-90 et al., Order on Reconsideration, 33 FCC Rcd 1380, 1398, para. 46 (2018); *Connect America Fund et al.*, WC Docket No 10-90 et al., Report and Order et al., 31 FCC Rcd 3087, 3115, para. 71 (2016); *Connect America Fund*, WC Docket No 10-90, Order, 31 FCC Rcd 12086, 12096, para. 35 (2016); *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17722, para. 149 (2011), *aff'd sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (citations omitted).

<sup>11</sup> *Id.* at 690, para. 10; see also *Wireline Competition Bureau Announces Connect America Phase II Support Amounts Offered to Price Cap Carriers to Expand Rural Broadband*, Public Notice, 30 FCC Rcd 3905, 3905-06 (WCB 2015) (adopting CAM v4.3).

<sup>12</sup> *Wireline Competition Bureau Releases Preliminary List and Map of Eligible Areas for the Rural Digital Opportunity Fund Phase I Auction*, Public Notice, DA 20-275 (WCB Mar. 17, 2020) (*Auction 904 Preliminary Eligible Areas Public Notice*).

<sup>13</sup> *Rural Digital Opportunity Fund Order*, 35 FCC Rcd at 692, para. 13 & n.30 (defining unsubsidized competitor); *Auction 904 Preliminary Eligible Areas Public Notice*.

<sup>14</sup> *Id.*

<sup>15</sup> See *Auction 904 Preliminary Eligible Areas Public Notice*.

<sup>16</sup> Charter Petition at 3-4.

commitment, Charter already has begun deploying service of at least 300/10 Mbps to 11,091 residences and businesses located within 2,127 census blocks currently identified as eligible for the Rural Digital Opportunity Fund Phase I auction.<sup>17</sup> Charter anticipates deploying service to residences and businesses located within 711 of these blocks before the Phase I auction starts in October 2020 and to residences and businesses in 1,228 of these blocks by the end of 2020. Charter also has applied for pole attachment permits in 2,088 of these census blocks and completed network construction designs in all but two of the required 2,127 census blocks.<sup>18</sup> Charter notes that, under the terms of its settlement with the state, its deployment must be complete by September 2021, “before an entity receiving subsidies for these census blocks at an October 2020 auction would be expected to even begin building.”<sup>19</sup> Thus, Charter argues that granting its waiver and excluding these blocks from the Phase I auction would be consistent with the Commission’s intent “to exclude areas where 25/3 Mbps or better service has been or will be deployed without Rural Digital Opportunity Fund support.”<sup>20</sup>

6. On April 14, 2020, the Bureau sought comment on Charter’s petition.<sup>21</sup> The New York Public Service Commission filed in the proceeding but did not oppose Charter’s request.<sup>22</sup> Numerous community organizations, leaders, and non-profit organizations supported Charter’s petition, expressing hope that Charter would increase broadband deployment in their areas.<sup>23</sup> Additional parties encouraged the Bureau to maintain consistency with the Commission’s intent in the *Rural Digital Opportunity Fund Order* to deploy broadband to the greatest number of locations and not fund blocks where service of 25/3

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<sup>17</sup> *Id.* at 3-4.

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 5 (citing *Rural Digital Opportunity Fund Order*, 35 FCC Rcd at 692, para. 13 & n.32).

<sup>21</sup> See *Wireline Competition Bureau Seeks Comment on Charter Communications, Inc. Petition for Waiver of Rural Digital Opportunity Fund Phase I Eligible Area Rules*, Public Notice, 35 FCC Rcd 3504 (2020).

<sup>22</sup> Letter from Robert Rosenthal, General Counsel, New York Public Service Commission, to Marlene H. Dortch, Secretary, FCC (Apr. 21, 2020) (explaining that “it is imperative that in the event Charter, or any other New York provider’s, waiver request of certain New York census blocks recently declared eligible for the Rural Digital Opportunity Fund (RDOF) Phase I auction is granted, in part or in whole, New York remain eligible for receipt of any additional funds awarded through subsequent phases of the RDOF auctions”).

<sup>23</sup> See Letter from Ashanti H. Dickerson, Pastor, New Hope Baptist Church Syracuse, to Chairman Ajit Pai, FCC (Apr. 28, 2020); Letter from Decarto D. Draper, Pastor, Tucker Missionary Baptist Church, to Marlene H. Dortch, Secretary, FCC (Apr. 28, 2020); Letter from Christina Lopez, Chief Executive Officer, Boundless Connections, LLC, to Chairman Ajit Pai, FCC (Apr. 28, 2020); Letter from Bernie Lynch, Geneva Education Foundation, to Chairman Ajit Pai, FCC (Apr. 28, 2020); Letter from Jim McGee, President and Chief Operating Officer, Newburgh Armory Unity Center, to Marlene H. Dortch, Secretary, FCC (Apr. 28, 2020); Letter from Robert M. Simpson, President and Chief Executive Officer, CenterState Corporation for Economic Opportunity, to Chairman Ajit Pai, FCC (Apr. 28, 2020); Letter from H. Benard Alex, Pastor, Victory Temple Baptist Church, to Chairman Ajit Pai, FCC (Apr. 27, 2020); Letter from John L. Brezinski, Minority Leader, Herkimer County Legislature, to Marlene H. Dortch, Secretary, FCC (Apr. 27, 2020); Letter from Heather C. Briccetti, President and Chief Executive Officer, The Business Council of New York State, Inc., to Marlene H. Dortch, Secretary, FCC (Apr. 27, 2020); Letter from Mark N. Eagan, President and Chief Executive Officer, Capital Region Chamber (Apr. 27, 2020); Letter from Dottie Gallagher, President and Chief Executive Officer, Buffalo Niagara Partnership, to Marlene H. Dortch, Secretary, FCC (Apr. 27, 2020); Letter from Shawn Roberson, Pastor, Southern Missionary Baptist Church, to Chairman Ajit Pai, FCC (Apr. 27, 2020); Letter from John Tobia, Supervisor, Town of North Collins, NY., to Chairman Ajit Pai, FCC (Apr. 27, 2020); Letter from Stacey Wicksall, Director, Macedon Public Library, to Chairman Ajit Pai, FCC (Apr. 27, 2020); Letter from Cheryl Brannan, Founder and Chief Executive Officer, Sister to Sister International, Inc., to Marlene H. Dortch, Secretary, FCC (Apr. 26, 2020); Letter from Charles Reaves, Executive Director, Literary Rochester, to Marlene H. Dortch, Secretary, FCC (Apr. 26, 2020).

Mbps would be deployed.<sup>24</sup> Conversely, a number of New York State residents, and community and state leaders opposed the waiver request, noting issues with previous Charter commitments and concern that Charter would not be required to serve all locations within the relevant census blocks.<sup>25</sup> Other parties raised additional specific concerns with Charter's request and requested that the Bureau continue to make these 2,127 census blocks eligible for the Phase I auction.<sup>26</sup>

### III. DISCUSSION

7. Generally, the Commission's rules may be waived for good cause shown.<sup>27</sup> Waiver of the Commission's rules is appropriate only if both: (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest.<sup>28</sup>

8. We find good cause to grant Charter's petition for waiver and to remove the 2,127 census blocks it identified from Phase I of the Rural Digital Opportunity Fund. We determine that doing so will further the Commission's goal that Rural Digital Opportunity Fund support flow to areas that are in the most need of universal service support to advance broadband deployment—those that remain wholly unserved with broadband speeds of 25/3 Mbps.<sup>29</sup> Additionally, removing these census blocks from the Phase I auction will ensure that our finite universal service dollars are put to their best use by not funding another provider to overbuild Charter or funding Charter to deploy service in areas where it already has an enforceable commitment to do so. Stated alternatively, doing so furthers the Commission's universal service goals of directing support to increase broadband deployment in areas that are unserved or underserved, rather than in areas where a competitor already provides service. Finally, we note that Charter is deploying broadband service well in excess of the Rural Digital Opportunity Fund Above Baseline tier and well in advance of the deployment milestones for Rural Digital Opportunity Fund Phase I auction winners. Thus, residents of New York State will receive rapid deployment of more robust broadband services than they otherwise may receive from an Auction 904 support recipient, allowing Rural Digital Opportunity Fund support to flow to areas that are truly unserved and in need of broadband deployment.

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<sup>24</sup> Comments of NCTA – The Internet & Television Association (Apr. 21, 2020); Reply Comments of Gregory L. Rosston and Scott J. Wallsten (Apr. 28, 2020).

<sup>25</sup> See Letter from David Berkstresser, Supervisor, Town of Webb, NY, to Chairman Ajit Pai, FCC (Apr. 21, 2020); Letter from Donald W. Bilow, Supervisor, Town of Chateaugay, to Chairman Ajit Pai, FCC (Apr. 21, 2020); Letter from Robin J. Hill, Executive Director, Central Adirondack Partnership for the 21st Century, to Chairman Ajit Pai, FCC (Apr. 21, 2020); Comments of Dan Stec, Assemblymember, State of New York Assembly (Apr. 21, 2020); Letter from Frank Thomas, Chairman, Warren County Board of Supervisors, to Chairman Ajit Pai, FCC (Apr. 21, 2020); Letter from David Wolff, Broadband Committee Chairman, AdkAction, to Chairman Ajit Pai, FCC (Apr. 21, 2020); Letter from Didi Barnett, Assemblymember, State of New York Assembly, to Marlene H. Dortch, Secretary, FCC (Apr. 20, 2020); Comments of Mary A. Brown, (Apr. 20, 2020); Letter from Joshua A. Fiske, CIO, Clarkson University, to Chairman Ajit Pai, FCC (Apr. 20, 2020); Letter from Andrea Hogan, Supervisor, Town of Johnsbury, NY, to Chairman Ajit Pai, FCC (Apr. 20, 2020); Letter from Beth Schiller, Owner, CvWireless LLC, to Chairman Ajit Pai, FCC (Apr. 20, 2020).

<sup>26</sup> See Joint Comments of Otsego Electric Cooperative, Inc. and OEConnect, LLC (Apr. 21, 2020) (Otsego Electric Coop Comments); Comments of Starry, Inc. (Apr. 21, 2020) (Starry Comments); Comments of the Wireless Internet Service Providers Association (Apr. 21, 2020) (WISPA Comments).

<sup>27</sup> 47 CFR § 1.3.

<sup>28</sup> See *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969), *cert. denied*, 93 S.Ct. 461 (1972)) (*Northeast Cellular*).

<sup>29</sup> *Rural Digital Opportunity Fund Order*, 35 FCC Red at 688, para. 5 (stating the Commission's intent to "move expeditiously to commence an auction in 2020 for those areas we already know with certainty are currently unserved").

9. First, we find that special circumstances warrant deviation from the Commission’s rules and removal of these census blocks from the Phase I auction. As the Commission observed in the *Rural Digital Opportunity Fund Order*, the overarching goal of Phase I is to ensure that “finite universal service support is awarded in an efficient and cost-effective manner and does not go toward overbuilding areas that already have service.”<sup>30</sup> Thus, the Commission excluded from the auction census blocks where “a terrestrial provider offers voice and 25/3 Mbps broadband service” as well as those “identified as having been awarded funding through the U.S. Department of Agriculture’s ReConnect Program, or awarded funding through other similar federal or state broadband subsidy programs to provide 25/3 Mbps or better service.”<sup>31</sup> Charter explains that it has already undertaken extensive work to further broadband deployment to the 11,091 residences and businesses located within the 2,127 census blocks it seeks to have removed from the Phase I auction.<sup>32</sup> In fact, Charter will complete deployment to approximately one-third of these blocks by the time the Rural Digital Opportunity Fund Phase I auction commences in October 2020, and to more than half of these blocks by the end of 2020.<sup>33</sup> Further, Charter is required by the terms of its settlement agreement with New York to complete its deployment to these blocks no later than September 2021.<sup>34</sup> Because Charter will deploy to a majority of these blocks before the end of this year and complete its deployment before any Rural Digital Opportunity Fund Phase I auction winners will be required to meet even their first deployment milestones, we agree with NCTA that making these blocks eligible for the Phase I auction would be “every bit as wasteful and counterproductive as directing such funding to areas that already are subject to deployment commitments through the federal ReConnect program or comparable state programs.”<sup>35</sup> We conclude that it would be inconsistent to exclude census blocks from the Phase I auction where a provider has a subsidized commitment—for example, through the ReConnect program or a state broadband program—yet include census blocks where, as here, a provider has an unsubsidized commitment to deploy at least 25/3 Mbps service.<sup>36</sup>

10. Additionally, we find that it serves the public interest to grant Charter’s waiver petition and exclude these 2,127 census blocks from the Phase I auction. The Commission established four performance tiers for the Rural Digital Opportunity Fund Phase I auction, each with its own minimum download and upload speed.<sup>37</sup> As Charter explains, it is in the process of deploying broadband service of speeds of at least 300/10 Mbps in New York State, and in some instances, has deployed service with download speeds of up to 940 Mbps across the state.<sup>38</sup> These download speeds well exceed the download speeds for three of the performance tiers established by the Commission for the Rural Digital Opportunity Fund and approach even the highest speed tier, which requires bidders to serve locations with 1 Gbps/500 Mbps speeds.<sup>39</sup> Thus, residences and business in these 2,127 census blocks are likely to experience

<sup>30</sup> *Id.* at 692, para. 13.

<sup>31</sup> *Id.*

<sup>32</sup> Charter Petition at 4 (“Charter has already begun deployment through some combination of physically walking out the census block, preparing detailed network design plans, filing applications for pole permits, and installing the necessary network elements”).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> NCTA Comments at 4.

<sup>36</sup> Charter Petition at 5-6. We note that the New York Public Service Commission implemented several enforcement mechanisms to ensure Charter’s compliance with the terms of its settlement agreement, including requiring Charter to meet interim milestones every four months and to submit monthly reports detailing its progress towards meeting these milestones. See State of New York Public Service Commission, Cases 15-M-0388 and 18-M-0178, *Order Adopting 2019 Settlement Agreement and Reconsidering Other Related Actions*, at 16-17 (July 11, 2019). Moreover, Charter is subject to financial penalties for failing to meet any of its interim milestones. *Id.* at 17.

<sup>37</sup> *Rural Digital Opportunity Fund Order*, 35 FCC Rcd at 702-03, para. 31.

<sup>38</sup> Charter Petition at 1.

download speeds that are in excess of the speeds that a Phase I auction winner would provide. Moreover, as detailed above, the terms of Charter's settlement agreement with New York State require it to complete its deployment no later than September 2021.<sup>40</sup> Because of the timing of the Rural Digital Opportunity Fund Phase I auction, winning bidders likely will not be authorized to receive support until early 2021, at which point they will begin constructing their networks and deploying services. Winning bidders will be required to have deployed service to 40% of covered locations at the end of their third year of support. Thus, residences and businesses in these 2,127 census blocks will experience not only greater speeds, but also more rapid deployment of robust broadband service than they otherwise would if they were served only by a Phase I auction winner. We find these public interest benefits to be compelling rationales for removing these census blocks from the Phase I auction.

11. Some commenters argue that Charter's petition is anti-competitive and that these blocks should be included in the Phase I auction to protect against Charter later deciding to satisfy its commitment to New York State by serving locations in other census blocks and leaving some or all of the 2,127 census blocks identified in the waiver petition without any provider.<sup>41</sup> As an initial matter, we note that the purpose of the Universal Service Fund is not to directly provide and promote competition, but to ensure that our finite resources are used to further deployment in areas that are most in need—those that are unserved by 25/3 Mbps service.<sup>42</sup> Moreover, even if these blocks were eligible for the Phase I auction, there is no guarantee they would be bid on by any provider or that any provider would ultimately be awarded support to serve them. As to any flexibility Charter has under its settlement agreement with New York State to serve different locations, we are not persuaded that such flexibility weighs in favor of denying its petition. Charter itself explains that it does not intend “to use its theoretical ability to make modest future changes to the address list in a manner that would cause it to no longer extend service to the census blocks at issue” because it has “expended significant resources in these census blocks already, including developing time-intensive network deployment plans that it is now in the process of implementing.”<sup>43</sup> Based on the progress Charter has made on its deployment plans and its statements to the Commission, we conclude that any concerns that these census blocks may be left unserved are minimal. Moreover, even if this does occur, Phase II of the Rural Digital Opportunity Fund will target partially served census blocks, as well as census blocks that are unawarded in the Phase I auction.<sup>44</sup>

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<sup>39</sup> *Rural Digital Opportunity Fund Order*, 35 FCC Rcd at 702-03, para. 31.

<sup>40</sup> Charter Petition at 4.

<sup>41</sup> Otsego Electric Coop Comments at 3-4; WISPA Comments at 5-6; Letter from David Berkstresser, Supervisor, Town of Webb, NY, to Chairman Ajit Pai, FCC (Apr. 21, 2020); Letter from Robin J. Hill, Executive Director, Central Adirondack Partnership for the 21st Century, to Chairman Ajit Pai, FCC (Apr. 21, 2020); Letter from Frank Thomas, Chairman, Warren County Board of Supervisors, to Chairman Ajit Pai, FCC (Apr. 21, 2020); Letter from David Wolff, Broadband Committee Chairman, AdkAction, to Chairman Ajit Pai, FCC (Apr. 21, 2020); Letter from Didi Barnett, Assemblymember, State of New York Assembly, to Marlene H. Dortch, Secretary, FCC (Apr. 20, 2020); Letter from Andrea Hogan, Supervisor, Town of Johnsbury, NY, to Chairman Ajit Pai, FCC (Apr. 20, 2020); Letter from Beth Schiller, Owner, CvWireless LLC, to Chairman Ajit Pai, FCC (Apr. 20, 2020).

<sup>42</sup> *Connect America Fund; Universal Service Reform-Mobility Fund*, WC Docket No. 10-90, WT Docket No. 10-208, Second Order on Reconsideration, 33 FCC Rcd 2540, 2556, para. 25, n.128 (“The Commission has repeatedly held that universal service funding is meant to subsidize the expansion and preservation of coverage, not marketplace competition or certain competitors”); *Connect America Fund, et al.*, WC Docket No. 10-90, et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17780, para. 319 (“Based on the experience of a decade . . . we conclude that this prior policy of supporting multiple networks may not be the most effective way of achieving our universal service goals. In this case, we choose not to subsidize competition through universal service in areas that are challenging for even one provider to serve”).

<sup>43</sup> Reply Comments of Charter Communications, Inc., at 9 (Apr. 28, 2020) (Charter Reply Comments).

<sup>44</sup> *Rural Digital Opportunity Fund Order*, 35 FCC Rcd at 690, para. 9.

12. We also reject several specific objections from parties opposing Charter’s waiver. Starry notes that the Commission did not account for the future deployment plans of providers when establishing procedures for the Rural Digital Opportunity Fund Phase I auction but instead “is targeting support based on the state of network deployment today.”<sup>45</sup> As a result, Starry argues that because “Charter has not deployed its network to provide service to these locations . . . they should be included in the RDOF auction.”<sup>46</sup> However, we note that the Commission specifically excluded from the Phase I auction areas where a provider is receiving federal or state subsidies to provide 25/3 Mbps or better service—which, in many cases, are future deployments subject to enforceable commitments—for the express purpose of “ensur[ing] that the Commission’s auction does not award duplicative or unnecessary support.”<sup>47</sup> This same rationale applies here. Charter’s deployment in New York is an enforceable, unsubsidized deployment. Charter’s deployment is unique, unlike planned, future deployment that any carrier may potentially undertake (but later change or abandon). Here, Charter must meet specific milestones and deadlines governing its buildout and will be subject to penalties for failing to meet these requirements. Moreover, granting Charter’s petition ensures that the Phase I auction does not award unnecessary support in areas where Charter is mandated by the State of New York to deploy service well in excess of 25/3 Mbps. If these census blocks continue to be eligible for Auction 904, Charter could potentially bid on and be awarded support to serve these blocks, resulting in the Commission funding deployment in areas that Charter already has an enforceable commitment to serve under the terms of its settlement agreement with the State of New York. Additionally, Charter already has deployed or begun the process of deploying to many of these census blocks and anticipates deploying to more than one-third of the blocks even before the Phase I auction commences.<sup>48</sup> Allowing limited federal dollars to flow to these blocks, therefore, would be contrary to the Commission’s intent in establishing the procedures for the Phase I auction and risk overbuilding Charter at the expense of unserved areas not receiving any support in the auction.

13. Additionally, Otsego Electric Cooperative argues against Charter’s petition because it will only be serving a “very small percentage of homes and/or businesses” in the majority of the census blocks it seeks to exclude from the Phase I auction.<sup>49</sup> While Charter has committed to building to 11,091 residences and businesses in the 2,127 census blocks in question, staff analysis indicates that there are 14,942 eligible locations in these blocks—a difference of almost 3,900 locations. Because these 3,900 locations would be located in partially served census blocks following completion of Charter’s planned deployment, they likely would be eligible for the Rural Digital Opportunity Fund Phase II auction in the absence of any additional deployment by Charter or another provider. However, as Charter observes, nine other providers have received funding through the New NY Broadband Program to serve approximately 25% of the 2,127 census blocks in question.<sup>50</sup> Staff analysis indicates that there are just over 4,200 locations within the census blocks receiving support through the New NY Broadband Program. Thus, we expect that recipients of funding through the New NY Broadband Program will make up a large portion, of not all, of the shortfall of Charter’s deployment in these 2,127 blocks. Moreover, because the Phase I auction is a competitive auction with a fixed budget, there is no guarantee that there will be a winning bidder for each eligible census block, and we cannot predict that more locations in these 2,127 census blocks would be deployed through the auction. Finally, as the Commission recognized in the *Rural Digital Opportunity Fund Order*, the number of locations in each census block is somewhat

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<sup>45</sup> Starry Comments at 3

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Charter Petition at 4.

<sup>49</sup> Otsego Electric Coop Comments at 3.

<sup>50</sup> See Charter Reply Comments at 7, Exh. A. See also New York State Broadband Program Office, *The New NY Broadband Program*, available at <https://nysbroadband.ny.gov/about> (last visited June 18, 2020).

uncertain and will be updated during the auction's support term,<sup>51</sup> so it may not be the case that the entire 3,900-location difference between the preliminary eligible areas list and Charter's commitment represents actual locations to which service would be deployed.

14. WISPA also raises several procedural challenges to Charter's petition. First, WISPA argues that Charter's petition is "premature" because the Bureau "sought comment on the Bureau's preliminary list of eligible census blocks, not the census blocks for which support ultimately will be available."<sup>52</sup> We are unconvinced by this argument; there is no requirement that the list of census blocks in question must be the final list of census blocks, as WISPA apparently contends. The Bureau released this preliminary list of census blocks precisely in order to be able to refine the census blocks list to ensure that our finite universal service dollars are spent efficiently and not dedicated to overbuilding specific areas. Second, WISPA incorrectly claims that "[u]nlike dozens of other providers, Charter did not participate in the limited challenge process" when in fact Charter has submitted multiple challenges and supplements to those challenges.<sup>53</sup> Third, we are unpersuaded by WISPA's contention that Charter's petition is an end run around the Commission's rules.<sup>54</sup> As Charter observes, section 1.3 of the Commission's rules provides no prerequisite that a party exhaust its other remedies before filing a waiver petition.<sup>55</sup> Thus, we reject WISPA's procedural arguments.

15. Finally, WISPA argues that granting Charter's petition "would open the door for any party to leverage a merger commitment into foreclosure of competition."<sup>56</sup> We again reiterate that the goal of the Universal Service Fund is to ensure that unserved and underserved areas of the country alike have access to robust broadband services, not provide a guarantee of competition.<sup>57</sup> We also note that in other contexts, the Commission specifically has highlighted such commitments in determining how to best apportion universal service funding and determine which areas should be eligible to receive support. For example, the Commission recently observed that if it did "not adequately account for T-Mobile's [merger] commitments, we risk using finite universal service 5G Fund support to overbuild areas where T-Mobile already has an enforceable obligation to deploy."<sup>58</sup> The Commission also sought comment on whether other carriers have enforceable commitments to deploy 5G and whether those areas should be removed from the 5G Fund auction.<sup>59</sup> Such an approach supports a grant of Charter's petition. Allowing

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<sup>51</sup> *Rural Digital Opportunity Fund Order*, 35 FCC Rcd at 709, para. 45.

<sup>52</sup> WISPA Comments at 3.

<sup>53</sup> See Letter from Elizabeth Andrion, Senior Vice President, Regulatory Affairs, Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC (Apr. 10, 2020) (submitting lists of census blocks where Charter has deployed 25/3 Mbps or better broadband services and where it has been awarded funding by a federal or state broadband subsidy); Letter from Christine Sanquist, Vice President, Regulatory Affairs, Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC (Apr. 22, 2020) (supplementing its challenge filing to provide additional details about the census blocks in which it received Broadband Expansion Grants from the Wisconsin Public Service Commission); Letter from Christine Sanquist, Vice President, Regulatory Affairs, Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC (May 18, 2020) (supplementing its challenge filing to provide additional details about the census blocks in which it Broadband Infrastructure Grants from the Maryland Department of Housing and Community Development).

<sup>54</sup> WISPA Comments at 3-5.

<sup>55</sup> Charter Reply Comments at 11; 47 CFR § 1.3.

<sup>56</sup> WISPA Comments at 9.

<sup>57</sup> See *infra* para. 12.

<sup>58</sup> See *Establishing a 5G Fund for Rural America; Universal Service Reform – Mobility Fund*, GN Docket No. 20-32, WT Docket No. 10-208, Notice of Proposed Rulemaking and Order, FCC 20-52, at para. 23 (Apr. 24, 2020) (*5G Fund NPRM and Order*).

<sup>59</sup> *Id.* at para. 133.

these census blocks to be part of the Rural Digital Opportunity Fund Phase I auction would result in potentially awarding support to another provider to overbuild the areas where Charter is in the process of deploying service. Moreover, unless a bidder proposes to build gigabit services in these areas, we risk funding a provider to overbuild Charter with service inferior to the 300/10 Mbps service Charter is deploying. We do not find WISPA's argument persuasive and reject the contention that removing these areas from the Phase I auction would set a "dangerous precedent."<sup>60</sup>

16. In sum, we conclude that special circumstances exist to grant Charter's waiver request and that doing so is in the public interest. Removing these census blocks from the Rural Digital Opportunity Fund Phase I auction will maximize the amount of support available to wholly underserved areas of the country, furthering the Commission's universal service goals and ensuring that funding is not used to overbuild areas where a competitor already provides broadband service of 25/3 Mbps or greater. Moreover, granting Charter's waiver will result in clear benefits for residents of the State of New York, who will experience more rapid deployment of robust broadband services as a result of Charter's current buildout than they would receive otherwise from a Phase I auction winner.

#### **IV. ORDERING CLAUSES**

17. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, 1.3, that this Order IS ADOPTED.

18. IT IS FURTHER ORDERED that the petition for waiver filed by Charter Communications, Inc. IS GRANTED as described herein.

19. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Chief  
Wireline Competition Bureau

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<sup>60</sup> WISPA Comments at 1.