



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON DC

March 16, 2020

Mike O’Rielly
Commissioner

Mr. Chad Rupe
Administrator
Rural Utilities Service
US Department of Agriculture
1400 Independence Ave., SW
Washington, DC 20250-1510

Re: Funding Opportunity Announcement (FOA) and solicitation of applications for second round of the ReConnect Program, Docket: USDA–2017–0002–0001

Dear Administrator Rupe:

As you are aware, I have been closely following all federal broadband funding programs, including the ReConnect Program’s grant and loan disbursements, to ensure that funds are distributed as efficiently as possible and directed foremost to those communities lacking any broadband service, rather than those areas already served by an existing provider. To that end, I have voiced concerns to the Rural Utilities Service (RUS) over the use of scarce ReConnect Program funding to overbuild existing networks, whether built through private investment or via government subsidies. I raised many of these issues in previous comments that I filed in September 2018,¹ and in our in-person meeting on December 17, 2019. I was grateful for your willingness to meet with me and consider my concerns.

With the second round of funding forthcoming, I remain concerned about RUS rules that have the potential to undermine the success of the program in addressing the needs of those millions of Americans currently without access to broadband service. While I applaud RUS for introducing certain beneficial changes for the second round, particularly the decision to expand the time period for submitting a challenge to a funding decision from 30 to 45 days, other criteria are likely to result in potentially wasteful or problematic spending. Among the more troubling aspects of the second round’s framework are (1) the decision to lower the threshold at which an area must be unserved to be eligible for a 100 percent grant from 100 percent unserved to 90 percent unserved; (2) a lack of consistent and transparent practices governing the challenge process; (3) the absence of comprehensive measures to exclude from eligibility areas already subject to enforceable deployment obligations; and (4) the decision to disproportionately favor fiber technology in the application scoring process. I would respectfully request that you consider these concerns, as further outlined below, and consider appropriate programmatic revisions as you move toward awarding further funding or designing future ReConnect Program rounds.

Rather than targeting scarce federal dollars to the truly unserved, the new 90 percent threshold will likely lead to subsidized overbuilding and leave the most remote areas without service

In my previous comments on designing the RUS pilot program, I advised that subsidizing buildout in areas that one or multiple providers already serve is an inefficient use of limited resources, and, moreover, undermines private incentives to invest in broadband buildout. I was, therefore, dismayed

¹ Letter from Commissioner Michael O’Rielly, FCC, to Christopher McLean, Acting Administrator, Rural Utilities Service (September 10, 2018).

upon learning that for the second round of the ReConnect Program, RUS had decided to abandon its sound decision to limit 100 percent grants to areas that were 100 percent unserved, and instead lower an area's unserved threshold to 90 percent. Rather than targeting grant money to those most remote and expensive to serve areas, this revised threshold will likely result in upgrading service in lower cost areas that are not in need of broadband subsidies and leaving the hardest to reach areas without service. Further, by allowing applicants to use scarce funding to duplicate service in parts of the territory that already have service, the decision enables wasteful overbuilding at the expense of those truly in need. Our personal conversation on this point did not resolve my concerns but only raised further questions about the accuracy and feasibility of your assertion that lowering the threshold to 90 percent was necessary to avoid excluding areas where the number of served locations was negligible. While I am willing to countenance the possibility that the 100 percent unserved threshold was too rigid, the new 90 percent standard drastically overcompensates as a solution. RUS could have addressed the alleged problem via a much more appropriate "de minimis" exception, without creating the potential for significant swaths of subsidized overbuilding.

The decision to lower the threshold to 90 percent will also likely result in a much more burdensome and less transparent challenge process. In addition to the fact that the disposition of a given challenge will involve much greater discretion on the part of RUS, incumbent providers will be required to dedicate significantly more resources to prove an area is ineligible, which may ultimately deter challenges to otherwise ineligible applications. Further, challenging an application will be especially burdensome in areas where multiple providers collectively serve more than 10 percent of the territory, but no single provider can prove service to 10 percent on its own.

Better consistency and transparency in the challenge process are necessary to avoid wasteful spending

To ensure that providers are fully able to challenge ineligible applications, I would also implore RUS to take measures to improve consistency and transparency in that process. One concern raised in response to the first round's challenge process was that certain RUS field agents had taken an idiosyncratic approach to evaluating whether a location was served or unserved: rather than determining service based on the existence of broadband infrastructure, as is the common practice, certain field agents had deemed locations to be unserved due to the absence of a subscriber at the location.² In addition to the fact that subscribership is an irrational proxy for service and fails to give incumbent providers credit for their investment in broadband infrastructure, this definitional approach was apparently inconsistent across the challenge process.

While this peculiarity likely did not make much of a difference in the case of challenges to the first round of grants, it could prove to have major consequences in the second round, given the challenging party's much higher burden of proof. I would therefore recommend you consider implementing consistent and transparent guidelines for challenges and take appropriate steps to ensure uniform compliance by field agents.

More comprehensive measures are needed to exclude areas subject to enforceable deployment obligations

To protect the precious investments of those tasked with subsidizing broadband infrastructure, such as the millions of consumers who pay a monthly charge on their phone bills to support the FCC's Universal Service Fund, it is imperative that our agencies continue to coordinate to avoid awards that provide duplicative funding. To that end, I was pleased that RUS restricted from grant eligibility those

² Letter from Michael K. Powell, President and CEO, NCTA, to the Honorable Sonny Perdue, Secretary, U.S. Department of Agriculture at 5 (October 29, 2019).

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areas receiving funding through the FCC's Connect America Fund (CAF) Phase II Auction, and to hear that RUS has been in close contact with the FCC's staff to coordinate how to enforce that restriction.

At the same time, it is puzzling and potentially harmful that RUS failed to provide other federal broadband infrastructure programs with the same protections as CAF II. In the case of the FCC, the CAF II auction is only one of several funding mechanisms that is tied to enforceable buildout obligations. Rate-of-return carriers that elected model-based support under the Alternative Connect America Cost Model (otherwise known as A-CAM), as well as those receiving CAF Broadband Loop Support (BLS), receive billions of dollars every year in return for defined broadband buildout obligations, including at the 25/3 Mbps threshold, and they are required to file and certify geocoded location data on an annual basis into USAC's High Cost Universal Broadband (HUBB) portal to demonstrate compliance with these obligations. To avoid undermining those investments, RUS should restrict from funding eligibility areas subject to A-CAM and CAF BLS deployment obligations, as it did with CAF II.


Nor should explicit restrictions on eligibility be restricted to areas funded by federal agencies. For example, as a condition for approving its merger with Time Warner Cable, Charter Communications is subject to legally enforceable obligations to provide broadband service to locations across the state of New York. While currently available deployment data will not necessarily reflect the buildout obligations required of Charter, it would be incredibly wasteful for RUS to declare those areas eligible for ReConnect Program funding. And, even if Charter were to challenge a funding award in an area where it is required to deploy under these parameters, it is by no means clear that under current rules, that challenge would be recognized or even successful. RUS would be well-served to enact stricter eligibility rules at the outset to ensure that areas where a provider is already required to serve are not overbuilt as a result of ReConnect funding.

To stretch scarce program dollars as far as possible, funding ought to be distributed in a more technology neutral manner

In order to maximize innovation and public benefits, I have always supported the key, fundamental principle that broadband regulations and subsidies should strive to be technology neutral. Unfortunately, by assigning a disproportionate number of points to projects that propose to provide 100 Mbps symmetrical service, the ReConnect Program's scoring system seems to unfairly and discriminatorily tilt the scales towards fiber-to-the-premises technology over others that would serve consumers just as effectively. While it is true that higher upload speeds are necessary for a certain subset of applications, symmetrical service is by no means required for the vast majority of today's consumers, who have significantly greater download than upload needs. The decision to allocate such a higher weight to symmetrical service suggests that RUS is perhaps unwittingly and artificially favoring a particular technology at the expense of others, and I regret that this scoring metric was not modified for the second round of funding. As with all other elements of the program, evaluation criteria must above all be designed to meet the needs of those Americans who still to this day do not have any broadband service at all.

I appreciate your consideration of these views and stand ready to work with you to ensure that federal broadband funds are used for the greatest good possible.

Sincerely,



Michael O'Rielly