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

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

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The Coalition of RDOF Winners (or "RDOF Winners"), by their undersigned counsel, and pursuant to 47 C.F.R. § 1.3, hereby petition the Federal Communications Commission ("Commission") for emergency relief to address and mitigate the impacts of unforeseeable *force majeure* circumstances impacting the Coalition for RDOF Winners in the wake of the COVID-19 pandemic ("COVID"). Just months after COVID reached the shores of the United States and was declared a global pandemic, the Commission concluded Phase I of its $20.4 billion Rural Digital Opportunity Fund ("RDOF") auction to assist in the deployment of high-speed broadband networks in various unserved areas of the United States. This program involved a reverse auction where bids submitted were based on pre-pandemic expectations for construction costs.

Due to the impacts of COVID along with new, multi-billion dollar federal fiscal policies and pandemic-prompted broadband deployment funding programs, construction costs have skyrocketed—at a minimum of 30 percent, but some by as much as 100-300 percent. These massive cost increases could never have been anticipated by the Commission or the RDOF Winners prior to the auction. And, for this very reason, these unprecedented costs increases were not—and could not have been—accounted for in the RDOF Phase I cost models designed by CostQuest, which were used to determine reserve prices that dictated the level of federal funding made available to the auction winners.

To mitigate these unforeseeable circumstances and their associated harms, the Coalition of RDOF Winners respectfully request that the Commission grant certain or all of the following relief:

- Supplementary funding to RDOF Winners that have made an affirmative request for same;
- Relief from all, or certain aspects of, the letter of credit requirements on an expedited basis; and/or
- RDOF payments for years 7-10 made accessible by RDOF Winners in years 2 or 3-6.[1]

Additionally, as a complementary or alternative form of relief in certain circumstances, the Commission may also consider providing a short amnesty period that allows RDOF Winners to relinquish all or part of their RDOF winning areas without forfeitures or other penalties.[2] As detailed below, there is good cause for the Commission to grant the aforementioned relief to protect the integrity of the RDOF program.

[1] Given the force majeure issues RDOF Winners are facing, no quid pro quo should be required or expected for the remedies RDOF Winners seek herein. Nevertheless, RDOF Winners are willing to discuss the possibility of making a commitment to offer a free Internet service to ACP qualified customers for as long as ACP remains funded if supplemental funding and other remedies requested herein are provided to them.

[2] Another form of relief could possibly include the Commission making funding available in the form of low-interest loans or similar vehicles to RDOF Winners. This additional form of relief is not discussed herein since the Commission is not known for providing low-interest loans.

I. BACKGROUND

On January 30, 2020, the Commission adopted its Rural Digital Opportunity Fund Report and Order ("RDOF Report and Order").[3] The RDOF Report and Order established a framework to provide up to $20.4 billion to connect millions of unserved rural homes, farms, and small business to high-speed broadband networks. This framework included a two-phase reverse auction process, where Phase I began on October 29, 2020 and ended on November 25, 2020. Parties seeking to participate in the RDOF Phase I auction conducted research and prepared estimates for their bids in the second and third quarters of 2020, based on expected construction costs derived during that time. The Coalition of RDOF Winners is comprised of various ISPs that made successful bids in the Phase I auction.[4]

After the Phase I auction process concluded, Congress faced the mounting issues and disruptions caused by the pandemic and initiated new federal broadband funding programs—such as the Consolidated Appropriations Act, 2021, the American Rescue Plan Act of 2021 ("ARPA"), and the Infrastructure Investment and Jobs Act ("IIJA"), among others—to ensure that all Americans have access to high-speed broadband services. These federal programs—which did not exist at the time of the Phase I RDOF auctions—provided billions of additional dollars towards funding broadband construction in rural unserved and underserved areas of the United States.

As a result of these post-RDOF and pandemic-prompted federal funding programs, the cost to deploy broadband networks to the RDOF locations have skyrocketed due to massive increases in the demand for broadband construction materials, equipment, and labor. Other factors driving

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[3] *In the Matter of Rural Digital Opportunity Fund; Connect America Fund*, WC Docket Nos. 19-126 & 10-90, 35 FCC Rcd 686, FCC 20-5 (2020).

[4] The Coalition of RDOF Winners does not include all long-form, Commission authorized ISPs that had winning bids in the RDOF auction. In addition, the relief requested herein is made by the Coalition's members and could be limited to such members.

the cost increases include significant supply chain issues and spiraling inflation caused by pandemic-prompted market disruptions, fiscal policies, and other factors. *Overall, since the Phase I RDOF reverse auction bids were submitted, broadband deployment costs have significantly increased, at a minimum of 30 percent, but some by 100 to 300 percent*. These construction costs are expected to spike upwards even further once the National Telecommunications and Information Administration's ("NTIA") BEAD and Middle Mile programs begin awarding grants.

Anecdotal examples of the enormous increases in broadband construction costs that certain RDOF Winners have reported are:

- In the span of 2 years, **total costs to build have risen almost 4 times**.
- **Costs of materials have quadrupled** in some cases; **splice cases tripled**; and interest rates on the cost of money have increased 62.5%, compounding the corresponding increases in freight and material costs.
- Overall **costs have at least doubled if not tripled**. Costs of fiber construction have risen from a blended rate of **$9 per foot to upwards of $18 per foot**. Cost of labor has risen as well.
- Costs of everything have increased: underground vaults have **increased by almost 200%**; drop fiber has **increased by 100%**; and innerduct (conduit) has **increased by 44%**.
- The cost of fiber **more than doubled**, and the cost of pipe, handholes, and splice cases **more than tripled** since construction started.
- Overall, cost of materials **have increased 100%** from 2021 to 2022. Delivery times have increased 6-18 months. In-stock on the shelf items are a thing of the past. Labor/contractors/machines are very difficult, if not impossible, to find. Small Horizontal Directional Drills ("HDD") are not available; large ones are $250,000 and do not fit FTTH projects.
- The costs for supplies, labor, equipment, etc. **all have gone up 30-300%**..[5]

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[5] These bullets reflect various individual statements from certain members of the Coalition of RDOF Winners. For this list, each of them has provided examples of certain levels and types of cost increases it is specifically facing, which may be different among Coalition members. Overall, this list is simply designed to show that based on various feedback from Coalition members,

Various other ISP representatives, among others, have acknowledged significant broadband deployment cost increases.[6]

broadband construction costs have dramatically increased across the board since the Phase I RDOF auction took place.

[6] *See, e.g.,* Fiber Broadband Association, *Strategies to Mitigate Bottlenecks in the Current Fiber Broadband Supply Chain* (Mar. 2023) (explaining that "[p]andemic-related shutdowns, extreme weather and military conflicts in other countries have halted or slowed production for both necessary raw materials and assembled components, while complications in the shipping process have led to price increases of anywhere from 40-100% as well as substantial delivery delays."); Larry D. Thompson, PA and Cole Donahue, VantagePoint, *Cost of Bringing Broadband to All,* at 7 & 13 (Aug. 1, 2022), *available at* https://www.vantagepnt.com/about/advocacy-involvement/broadband-for-all/ (explaining that "the significant price increases experienced over the last couple of years are expected to continue and will likely accelerate" and "[t]he investment required to deploy broadband has increased significantly over the last few years due to increasing costs, such as labor and material, as well as costs associated with factors such as environmental and supply chain issues."); David B. McGary, *Fiber Providers Feeling Hear of Inflation as Cost of materials, Labor Rise* (Sep. 8, 2022), *available at* https://broadbandbreakfast.com/2022/09/fiber-providers-feeling-the-heat-of-inflation-as-cost-of-materials-labor-rise/ (explaining that "[i]nflation-driven high prices for materials and labor are putting significant economic pressure on builders of fiber networks"); Karen Fischer, *How much will shipping cost impact rural broadband builds* (Apr. 17, 2023), *available at* https://www.fiercetelecom.com/telecom/how-much-will-shipping-costs-impact-rural-broadband-builds (explaining that "[o]perators across the board have already flagged rising deployment costs related to inflation, geopolitical issues and labor shortages" and "telecom is slated to take a serious hit in costs in the near term"); Teralyn Whipple, *Broadband Industry Grapples with High Inflation and Acute Workforce Shortage* (Dec. 26, 2022), *available at* https://broadbandbreakfast.com/2022/12/broadband-industry-grapples-with-high-inflation-and-acute-workforce-shortage/#:~:text=Government%20officials%20warned%20last%20summer%20that%20the%20increased,recent%20white%20paper%20from%20the%20Fiber%20Broadband%20AssociationW (explaining that "Inflation-driven high prices for materials, supply chain disruptions, and a shortage of workforce labor are putting significant economic pressures and delays on builders of fiber networks" and that "[r]ising costs of goods are estimated to push costs of each new mile of fiber upward an additional $4,814, according to consulting firm Dgtl Infra in a July report."); Chris Dunker, *Cost per location grows fivefold in second round of Nebraska broadband grant program* (Dec. 8, 2022, updated May 23, 2023), *available at* https://journalstar.com/news/state-and-regional/govt-and-politics/cost-per-location-grows-fivefold-in-second-round-of-nebraskas-broadband-grant-program/article_91eb0902-b8ba-598b-9282-7e47a3939047.html (stating that "while the first round of funding approved in January connected 12,600 homes at roughly $1,540 per location, the cost per location in the second round has **increased more than fivefold**.) (emphasis added).

The Commission itself has recognized these "unprecedented" cost increases and the "economic challenges that carriers face as they emerge from the pandemic."[7] Likewise, in a recent letter to Chairwoman Rosenworcel, Senators Wicker, Hyde-Smith, and Vance noted the significant cost increases faced by Phase I RDOF winners, including "at least a 70 percent increase" in fiber costs.[8] While the cost increases for network deployment are thus well-known and recognized, they may also be promptly confirmed by having the Commission rerun its CostQuest cost model to recalculate the reserve prices for the 2020 RDOF Phase I auction using current broadband deployment costs. The Commission has recognized these cost increases in other contexts, providing relief to rate-of-return carriers that receive USF support in 2021, 2022, 2023, and 2024, given the "importance of providing broadband services during this unprecedented time."[9]

For the same reasons, the Commission should provide relief to the RDOF Winners. Though the RDOF Winners are understandably responsible for anticipating pre-COVID cost increases to cover reasonable inflation expected at the time bids were made, RDOF Winners should not have to independently shoulder unforeseeable, exponential cost increases prompted by the pandemic and pandemic-related government programs and fiscal policies that caused broadband construction

[7] *See Connect America Fund*, WC Docket No. 10-90, Order, FCC 23-40, ¶¶ 10-12 (rel. May 23, 2023) ("*2023 BCM Order*") (the Commission waived the budget control mechanism for 2023 to 2024 tariff year); *Connect America Fund*, WC Docket No. 10-90, Order, 37 FCC Rcd 6271, FCC 22-32, ¶¶ 5 & 10 (rel. May 10, 2022) (the Commission waived the budget control mechanism for both the 2021 and 2022 tariff years).

[8] Letter from Honorable Roger F. Wicker, Cindy Hyde-Smith, and J.D. Vance, Senators, to Honorable Jessica Rosenworcel, Chairwoman, FCC (dated June 12, 2023); *see also* ZMS, *Warning! Soaring Fiber Optic Cable Prices Face Shortage Crisis*, KVCABLE.COM, *available at* https://kvcable.com/warning-soaring-fiber-optic-cable-prices-face-shortage-crisis/#:~:text=The%20analyst%20added%20that%20fiber,groups%20to%20cut%20capital%20spending (explaining that "fiber costs have risen 70 percent from record lows in March 2021, from $3.70 to $6.30 per kilometer" with Wendell Weeks, CEO of Corning Incorporated stating "I've never seen an inflationary crisis like this in my career").

[9] *2023 BCM Order*, ¶ 12.

costs to increase astronomically. The RDOF Winners took the initiative to be leaders in providing high-speed broadband services to unserved rural areas of the United States before the other federal programs were established. These winners should not now be penalized or otherwise seriously financially disadvantaged as a result of the tremendous cost increases prompted by the new and unforeseeable federal programs and fiscal policies initiated in the wake of the pandemic. These programs could never have been anticipated at the time the RDOF Winners placed reverse auction bids, yet they have dramatically increased broadband construction costs. The Coalition of RDOF Winners urges the Commission to quickly address these significant broadband deployment cost increases by providing certain or all of the relief detailed below.

II. REQUESTS FOR RELIEF

A. Supplementary Funding

Phase I of the RDOF program included a reverse auction in which, generally speaking, those that submitted the lowest bids with the fastest broadband speeds were chosen as auction winners. The Commission initially planned to distribute $16 billion during Phase I, but ultimately authorized funding of only $6.062 billion, leaving $14.3 billion in the RDOF program. Given the cost increase challenges faced by RDOF Phase I winners—especially smaller providers—the Commission should make supplemental funding available from the initial amount obligated for the RDOF Phase I auction. Notably, in the Fall of 2022, USDA's Reconnect program made supplemental funding available to Reconnect Rounds 1 and 2 grant recipients due to the increases in broadband construction costs.[10]

The Coalition of RDOF Winners request that the Commission adopt temporary rules to provide supplemental funding to RDOF Winners that have made an affirmative request for such

[10] *See* Exhibit A attached hereto.

relief. Supplemental funding may be based on objective standards—such as by rerunning the Commission's CostQuest cost model used to determine reserve prices in the RDOF Phase I auction with current CostQuest cost information—to ensure consistency with the assumptions underlying the reverse auction process. Use of such an objective standard to determine supplemental funding will also preserve the integrity of the RDOF process by ensuring winning bidders are not placed in a better position as a result of the supplemental funds; rather, such funding will be designed solely to remedy the unprecedented and unforeseeable pandemic-prompted cost increases by tying the amount of the increased funding to the precise cost increases that no bidder could have reasonably anticipated.

This approach also addresses the issue of whether providing additional funding to RDOF winners would somehow be "unfair" to non-winning bidders, because the math underlying the bid decision would be the same. In other words, if a bidder dropped out at the 20% round in 2020 because the cost was too high, it is disingenuous to argue that the losing bidder would be able to step in now at 30% of the original cost basis when the overall cost basis has increased by far more than 10% percent. Providing this emergency supplemental support using the Commission's CostQuest cost model rerun or a similar objective standard will ensure the RDOF Winners are not required to shoulder unprecedented cost increases that were not and could not have been anticipated at the time Phase I bids were derived and submitted.

The RDOF Winners note that, contrary to certain claims, Chairwoman Rosenworcel's June 26, 23 letter to Senator Wicker *et al.* did <u>not</u> state that supplemental funding could not be made available. Rather, the letter stated that such supplementary funding was not "readily available" (*i.e.*, the Commission was not sitting on a pot of money to provide supplemental support) and also noted that contributions are adjusted on a quarterly basis to address funding needs.[11]

If supplemental funding was to be provided, the Commission could adjust the USF contribution percentage to allow for additional funding within the original RDOF Phase I budget that would cover the unforeseeable cost increases RDOF Winners now face. Notably, in an order just released on July 24, 2023, the Commission explained how it adjusts the USF contribution factor to allow additional USF funding for A-CAM carriers.[12] The Commission conceivably could use the same approach to provide supplemental funding for RDOF Winners.

If, however, the Commission is concerned about increasing the USF contribution factor above the amount envisioned in *FCC 23-60*, the FCC could—on its own motion—issue a Reconsideration Order of *FCC 23-60* that balances additional funding to A-CAM recipients with the supplemental funding being requested by the RDOF Winners. This would ensure A-CAM recipients are not given preferential funding of $19 to $20 Billion over a 15-year period[13] (*i.e.*, just under half of what NTIA's BEAD program has in its $42.45 Billion budget to provide high-speed broadband services to all unserved and underserved locations throughout the United States). Balancing the competing needs for such USF funds is especially important given that A-CAM funding was not based on a reverse/competitive auction program such as RDOF or a competitive bidding process as contemplated for the BEAD program.

[11] *See* Letters from the Honorable Jessica Rosenworcel, Chairwoman, FCC to the Honorable Roger F. Wicker, Hyde-Smith, and Vance, United States Senators (dated June 26, 2023), *available at* https://docs.fcc.gov/public/attachments/DOC-395063A2.pdf.

[12] *Connect America Fund, et al.,* WC Docket No. 10-90, Report and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 23-60, ¶¶ 60-64 (rel. July 24, 2023) ("*FCC 23-60*").

[13] *Id*. ¶ 60.

Indeed, only incumbent RLECs that receive such A-CAM funding under *FCC 23-60* benefit from this non-competitive additional funding over 15 years authorized in *FCC 23-60*. Thus, to ensure equitable treatment and timely broadband deployment under all of the Commission's USF supported programs, the Commission can and should reconsider *FCC 23-60* to provide necessary supplemental funding to RDOF Winners.

B. Relief from Letter of Credit Requirements

At a minimum, the Commission should grant a waiver of the burdensome letter of credit requirements set forth in 47 C.F.R. § 54.804(c).[14] Such waivers should address both (A) the letter of credit value requirements contained in 47 C.F.R. § 54.804(c)(1) and (B) the bank eligibility requirements contained in 47 C.F.R. § 54.804(c)(2).

First, as the unforeseeable cost increases place significant strain on RDOF Winners to contribute additional funds to construction for RDOF deployments, relief from letter of credit value requirements is critical to ensuring the flexibility necessary to adapt to current market realities. Under the default rules, RDOF Winners must maintain a standby letter of credit in a amount equal to, at a minimum, one year of support. The value requirement increases over years 2-4, up to a maximum of three (3) years of support in year 4. Banks generally require these standby letters of credit to be cash collateralized, meaning that the RDOF recipients have to tie up a significant portion of their free cash in support of these letters of credit. The Commission should

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[14] The Wireline Competition Bureau previously granted a waiver of these requirements. *Connect American Fund, et al.,* WC Docket No. 10-90 *et al*., Order, DA 22-951 (WCB Sept. 13, 2022) (granting a waiver to allow an RDOF winner to maintain its letter of credit with its current bank despite Weiss rating falling below C+). Additional petitions have since sought similar waivers. Point Broadband, LLC's Petition for Renewal of Waiver, WC Docket No. 10-90 *et al.* (filed Mar. 31, 2023), *available at* https://www.fcc.gov/ecfs/document/103310946905437/1; Declaration Networks Group, Inc.'s Petition for Waiver, WC Docket No. 10-90 *et al.* (filed Aug. 2, 2023), *available at* https://www.fcc.gov/ecfs/document/10802010517456/1.

waive these requirements, in whole or in part, so the funds and/or credit that would be tied up in these letters of credit (i.e., the amount of the entire letter or credit), along with the significant costs to maintain them, may be used to address the unforeseeable construction cost increases. Maintaining the letter of credit while having to absorb the huge construction cost increases RDOF Winners are facing exacerbates the significant financial burden on RDOF Winners.

Second, to the extent a letter of credit requirement remains, the Commission should waive the requirement that the issuing bank have a bank safety rating issued by Weiss of B- or better. Given current market realities, obtaining these extra funds is difficult to impossible, especially since many banks in this sector have tightened lending policies and have been seriously downgraded to Weiss ratings below B-. Additionally, where an RDOF Winner's existing issuing bank has been downgraded below B-, the default rules would require the RDOF Winner to obtain a new letter of credit from a new bank, which itself entails *significant* expense—compounding the difficulties that RDOF Winners already face. Thus, at the very least, the Commission should waive this requirement relative to any RDOF Winner where its issuing bank is downgraded below the default required ratings level.

C. RDOF Payments For Years 7-10 Made Accessible in Years 2 or 3-6

Under the default RDOF rules, RDOF support is provided to winning bidders over ten years, where support between the end of year 2 or 3 to the end of year six are based on reaching certain milestones.[15] As an alternative or additional form of relief to address unforeseeable cost increases, the Commission may grant waiver of its rules, including 47 C.F.R. § 54.802, to make RDOF payments associated with years 7-10 accessible to RDOF Winners in years 2 or 3-6.[16] Such

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[15] *See* 47 C.F.R. § 54.802(c)(1).

[16] The FCC has allowed increased funding over later periods within the term of funding. *See FCC 23-60,* ¶ 60

relief would help assuage the immediate and significant financial pressures facing RDOF Winners, thereby helping to ensure the viability of RDOF deployments in the short term. The need for any long-term relief may then be considered and addressed through complementary approaches in later years.

III. POSSIBLE COMPLEMENTARY OR ALTERNATIVE RELIEF

A. Amnesty Period to Relinquish Certain or All RDOF Winning Areas

In special circumstances, the Commission should also consider granting a waiver to its rules, including 47 C.F.R. §§ 54.802, 54.805 and 54.806, to the extent necessary to allow RDOF Winners a short amnesty window to relinquish all or part of their RDOF winning areas without forfeitures or other penalties. While this form of relief will not serve to address the challenges faced by many RDOF Winners, this option may prove useful in special cases—such as (i) where an RDOF winning area has been or is being overbuilt through funding provided by non-RDOF programs, such as ARPA or other state or federally-funded broadband construction programs, (ii) where there exists an opportunity to realign existing funding to sufficiently off-set construction cost increases in other areas, or (iii) if the supplemental funding the Commission provides in Section II.A., above, for an area does not sufficiently cover the increased costs the RDOF Winner now faces in that area.

Under this approach, the Commission—by granting this proposed waiver—may provide necessary relief to certain RDOF Winners without any corresponding need for USF contribution increases. 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.[17]

[17] *See, e.g.*, *FCC 23-60,* ¶¶ 11-18 (discussing the BEAD program).

before it is too late for that to happen.[18] This would ensure that sufficient funding for the relinquished unserved areas is potentially available for the deployment of broadband services under the BEAD program.

Indeed, as the unprecedented cost increases faced by RDOF Winners were caused largely by post-RDOF federal funding programs like BEAD, it is entirely appropriate to have the BEAD program serve as a *de facto* backstop to RDOF program in this way. The RDOF Winners emphasize that this and the other requests for relief herein should *not* be interpreted as an indication or suggestion of possible default on their RDOF obligations; rather, RDOF Winners only seek fair and appropriate treatment so that they are not required to shoulder the huge and heavy financial burden brought on by *force majeure* circumstances. Rather than waiting to address impacts of the significant and unprecedented cost increases years from now, this option provides the Commission with an immediate opportunity to ameliorate this financial burden now and ensure funding recipients across all federal programs are placed on equal footing.

To be sure, the right to relinquish certain RDOF winning areas during such an amnesty window could be based on an objective standard, such as a rerun of the Commission's CostQuest cost model to determine if the rerun reserve prices now materially exceed the actual reserve prices

[18] Under the BEAD program, state broadband offices have until December 27, 2023 to submit initial proposals reflecting all unserved and underserved areas within their states. *See* https://broadbandusa.ntia.doc.gov/sites/default/files/2023-07/Public_Webinar_Initial_Proposal_Challenge_Process_Slides.pdf at Slides 5 & 11. BEAD Model Challenge Process, at Sec. 1.2 and 1.4.5, *available at* https://www.ntia.gov/sites/default/files/publications/bead_model_challenge_process.zip. If a state seeks to include relinquished RDOF areas in the BEAD program, the state will need to show that the area is no longer subject to an "enforceable commitment" under the RDOF program. To do that by Dec. 27, 2023, the proposed amnesty window would need to be provided on an expedited basis, so that state broadband offices may include any relinquished RDOF areas within BEAD.

used in the Phase I auction.[19] By taking this approach, the Commission could allow an RDOF Winner to relinquish all or part of its RDOF winning areas and the associated RDOF funding without penalty.

Allowing a right to relinquish winning areas without penalty would also serve to address another unforeseeable predicament faced by certain RDOF Winners: overbuilds by ARPA or other state or federally-funded broadband construction projects. Indeed, while RDOF auction bids were based on expected returns from being the first to deploy broadband within winning areas, some of these areas are now being overbuilt by ARPA and other state or federally-funded broadband deployment projects.[20]

For instance, in Delaware, millions of dollars in ARPA funding were provided to incumbent ISPs, which overbuilt fiber in RDOF winning areas.[21] In addition to frustrating the auction process and participants' expectations, USF funds are wasted where they are allocated for deployments to the same rural residences being addressed by other programs. To make matters worse, at least one RDOF winner was apparently assessed forfeitures when giving back certain

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[19] For example, if the underlying reserve price for an RDOF Winner in a particular area has increased by 30% or more, that RDOF winner could avail itself of the amnesty window for that area.

[20] Oddly, the FCC's recently released "Broadband Funding Map" does not show these overbuilds and Delaware's 2021/2022 allocation of federal funds from ARPA that is paying for these overbuilds. *See* https://fundingmap.fcc.gov/home (last accessed on Aug. 15, 2023) (not showing any ARPA funding in Delaware); *see also* https://experience.arcgis.com/experience/c8637db6327646f9bf33432da9b82f85/ (showing 6,224 ARPA funded locations); https://broadband.delaware.gov/pages/index.shtml?dc=DelawareBroadbandStrategy (noting $33M in ARPA funds being used for high-speed Internet deployment); https://news.delaware.gov/2022/03/17/delaware-announces-start-of-universal-broadband-construction/ (noting the March 17, 2022 start date of the ARPA-funded deployment).

[21] "Delaware Broadband Grants to Big ISPs Raise Concerns," Communications Daily, Apr. 11, 2022 *available at* https://communicationsdaily.com/article/2022/04/11/del-broadband-grants-to-big-isps-raise-concerns-2204080034.

RDOF winning areas in Virginia where another ISP was awarded ARPA funds to overbuild the same areas.[22] Allowing amnesty window for RDOF Winners to relinquish such areas without penalty will thus avoid inefficient overbuilds and ensure taxpayer dollars are optimally allocated for deploying broadband to truly unserved and underserved areas.

An "amnesty window" approach could also be used in special cases to realign existing RDOF funding as a means to provide additional funding without increasing USF contribution percentage where supplemental funding discussed in Section II.A., above, does not sufficiently cover increased costs. If the Commission desires, however, to avoid a supplemental funding approach that may require increasing the USF contribution factor, the Commission could allow an RDOF Winner to relinquish certain RDOF areas and redirect the associated funding to non-relinquished areas. This approach could be done in an objective fashion too, by limiting any option to redirect funding from a relinquished area to a non-relinquished based on a rerun of the reserve pricing cost model.

For example, say an RDOF Winner's original commitment in its non-relinquished areas was $2,000 per location, and the reserve price in the Phase I auction was calculated to be $4,000 per location in those areas. If a rerun of the Commission's CostQuest cost model using current cost inputs determines an updated reserve price of $8,000 per location for those areas, the Commission could permit the winner to retain funding for the relinquished areas, without penalty, to off-set all

[22] Shenandoah Cable Television, LLC Petition for Waiver, WC Docket No. 10-90 *et al*. (filed Apr. 20, 2022) (requesting a waiver to relinquish certain areas where it was "discovered that state and local broadband programs in Virginia are planning to provide state-level support to providers other than the RDOF auction winners to provide high-speed broadband services, with access to voice services, in the same areas targeted by RDOF winners, including Shentel"). The Commission, however, issued an NAL against Shentel where it notified the Commission of its intent to default. *In the Matter of 22 Applicants for Rural Digital Opportunity Fund in Default*, File No. EB-IHD-23-00034754, NAL/Acc No. 202332080024, Notice of Apparent Liability for Forfeiture, FCC 23-33, at Appendix A ¶ 18 (rel. May 1, 2023).

or part of the $4,000 per location increase (which the RDOF Winner was never expected to absorb during the RDOF auction in the first place) for the areas the RDOF Winner keeps. In other words, any additional funding allowed through this approach would be designed to specifically address the increase in costs as determined by the Commission's cost model. Any relinquished locations could then be included in the BEAD program, which will be better positioned to fund the associated broadband construction in the face of current market realities.

IV. JUSTIFICATION FOR REQUESTED RELIEF

Pursuant to 47 C.F.R. § 1.3, any provision of the Commission's rules "may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of any chapter."[23] Further, "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."[24] The Commission may exercise its discretion to waive a rule where: (a) the particular facts make strict compliance inconsistent with the public interest; (b) special circumstances warrant a deviation from the general rule; and (c) such deviation will serve the public interest.[25] In making these determinations, the Commission may consider evidence of hardship, equity, and more effective implementation of overall policy on an individual basis.[26]

[23] 47 C.F.R. § 1.3.

[24] *Id*.

[25] *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[26] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Ne. Cellular*, 897 F.2d at 1166; *see also Petition of TeleGuam Holdings, LLC for Waiver and Certain Other Relief, Affordable Connectivity Program, et al.*, WC Docket No. 21-450 et al., Order, DA 23-571 (WCB rel. June 30, 2023) (waiving several rules and deadlines to assist providers in Guam and the Northern Mariana Islands affected by Typhoon Mawar); *In the Matter of Requests for Waiver of Sections 54.504(c), 54.504(f), 54.507(c), and 54.507(g) of the Commission's Rules, et al.*, CC Docket No. 02-6 *et al.*,

There is good cause to grant the requested waivers of the programmatic RDOF rules and requirements and adopt the temporary rules proposed.[27] The massive and unforeseeable cost increases faced by the RDOF Winners is—in effect—a *force majeure* event. At the time Phase I reverse auction bids were submitted, no bidder could have reasonably foreseen that the costs of equipment, labor, and materials would increase by 30%, to as much as 100-300%, in just over 2 years. As discussed, these cost increases have been brought on by pandemic-prompted policies and government expenditures, including additional, multi-billion-dollar federal programs to fund broadband deployment throughout the United States that have drastically increased demand for equipment, labor, and materials. This increased demand, combined with supply chain limiting disruptions and severe inflation, could not have been anticipated by the RDOF Winners when formulating their RDOF Phase I bids.

Order, 25 FCC Rcd 1653, FCC 10-27 (2010) (granting waivers of E-Rate funding rules due to impacts of Hurricane Katrina).

[27] *See* 5 U.S.C. §§ 553(b)(3)(B) (allowing for implementation without notice and comment or publication in the Federal Register if good cause exists); 553(d)(3) (allowing for effective date to occur prior to 30 days after publication for good cause). The Commission has used this authority to adopt temporary rules to address impacts of COVID and other *force majeure* circumstances. *See, e.g., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 35 FCC Rcd 10347, FCC 20-1091, ¶ 2 (WCB rel. Sep. 16, 2020) (adopting, on an emergency basis, "temporary rules to provide immediate relief to schools that participate in the E-Rate program as they continue to contend with the ongoing disruptions caused by the pandemic"); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 23 FCC Rcd 9538, FCC 17-139, ¶ 1 (2017) (adopting, on an emergency basis, "temporary rules to provide immediate relief to schools and libraries contending with the devastation caused by Hurricanes Harvey, Irma, and Maria"); *Federal-State Joint Board on Universal Service, et al.*, CC Docket Nos. 96-45 & 02-6, WC Docket Nos. 02-60 & 03-109, 20 FCC Rcd 16883, FCC 05-178, ¶ 1 (2005) (adopting temporary rules "to assist the victims of Hurricane Katrina by making available approximately $ 211 million of targeted support from the Universal Service Fund…for reconstruction and remediation relating to the restoration of telecommunications services").

Any claim that the risks of such cost increases were foreseeable[28] are farcical and simply do not pass the red face test. These claims can easily be debunked by comparing Commission's existing CostQuest cost inputs to those used to determine the reserve prices for the Phase I RDOF auctions. In short, the astronomical cost increases discussed above could never have been envisioned at the time reverse bids were placed during the RDOF auction.

Notably, the Commission itself did not anticipate such *force majeure* cost increases. Not only was the initial cost basis significantly lower than the actual cost basis, applicants submitted their financial projections along with their long-form applications on or before January 29, 2021. These projections contained assumptions related to the costs of materials and construction and were required to show the financials behind completion of the project and sustainability throughout the award period. If the Commission thought the construction cost estimates used in the long-form financial projections were out of synch with expected inflation or other anticipated cost increases, the Commission would have addressed such issues during the long form review. It did not do so, because these construction cost increases—and their correlative impact on RDOF projects in terms of cost of deployment and sustainability—were, in fact, not anticipated, nor could they have been anticipated at the time.

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[28] *See* Letter from Derrick B. Owens and Gerard J. Duffy, WTA – Advocates for Rural Broadband, to Marlene H. Dortch, Secretary, FCC, AU Docket No. 20-34, WC Docket Nos. 19-126 & 10-90 (dated July 28, 2023). WTA is also incorrect to suggest that the relief sought reflects an attempt to "game the auction process" or prejudice RDOF winners that have already paid default penalties. *Id*. at 2. Rather, the relief sought seeks to address *force majeure* circumstances in a non-preferential manner, using objective standards that will address massive cost increases that could not have been foreseen by any auction participant, were not accounted for in the Phase I cost model, and were not raised in the Commission's review of the RDOF Winner's long-form applications. The relief sought would thus apply equally to any RDOF Winner solely to address the cost increases, while preserving the integrity of the RDOF program's process and public interest objectives.

Requiring the RDOF Winners to shoulder the incredible financial burden of these unprecedented cost increases would be contrary to both the objectives of the RDOF program and principles of fairness. Indeed, under the RDOF reverse auction process, an RDOF Winner's obligation is associated with the difference between the reserve price determined by the Commission's CostQuest cost model and the winner's reverse auction bid. The cost model, however, was based on cost inputs anticipated at the time of the Phase I auction in 2020. Since these cost inputs have changed dramatically, so has the reserve price used to determine the winner's obligation. Thus, the funding awarded was based on cost assumptions that turned out to be incorrect due to entirely unforeseen events.

To put this into perspective, if the reserve price amounted to $4,000 per location and the reverse winning bid was $2,000 per location, the RDOF Winner's expectation was to contribute $2,000 per location plus costs of normal inflation—or roughly 50% of the cost. The RDOF program would then provide funding for the remaining $2,000. Thus, if expecting to serve 10,000 locations in its winning areas, the RDOF Winner expected to contribute $20,000,000 (*i.e.*, $2,000 per location * 10,000 locations) and would receive $20,000,000 in RDOF funding. However, in the current situation, where winning bidders have experienced unforeseeable cost increases post-auction—at a level of upwards of 100 percent—the cost per location in this example would skyrocket to $8,000 per location, which is double the reserve price. If no relief is provided, the RDOF Winner in this scenario must then shoulder $60,000,000 of the total $80,000,000 (or 75%) of actual costs, rather than the $20,000,000 reasonably expected in reliance on the Commission's CostQuest cost model that determined the reserve price. Even where costs have increased by 30%, that still represents a significant impact on the financial burden that must be borne by bidders who never expected the cost increases they now face. Imposing the entire burden of these cost increases solely on the RDOF Winners is simply wrong.

To be clear, to account for cost increases that were not envisioned when the Commission's CostQuest reserve prices were set for the RDOF Phase I auction, the Commission needs to provide relief to address the huge differential between **(a)** the original CostQuest reserve price calculated at the time of the Phase I auction and **(b)** the current CostQuest reserve price. This approach does not alter the original financial commitments that RDOF winners made with their reverse bids on a dollar basis, but rather addresses the *force majeure* cost increases between (a) and (b) above. As illustrated in the example above, the RDOF Winner still has the same financial commitment it originally made—in that example, $20,000,000—to build the broadband network to the required locations. However, because the *force majeure* cost increases drove up the reserve prices to build to those same locations, the Commission needs to provide financial assistance to address the differential. These cost increases were caused by Covid-prompted, federal government fiscal policies and broadband grant programs; they were not caused by any fault of the bidder and could never have been predicted when the RDOF Phase I auctions were conducted. For this reason, the heavy financial burden associated with these costs increases should not be borne by the RDOF winners.

The Commission should, therefore, provide the relief requested above to avoid placing this financial hardship solely on the RDOF Winners to shoulder these extraordinary, unforeseeable cost increases. Without such relief, the RDOF Winners will effectively be punished for acting as leaders in the Phase I reserve auctions.

V. CONCLUSION

WHEREFORE, the Coalition of RDOF Winners respectfully request that the Commission grant the relief requested in this Petition to address the unprecedented broadband construction cost increases that could never have been anticipated at the time RDOF Phase I bids were submitted. The relief proposed is necessary to address the severe hardship brought on by *force majeure* circumstances: unfathomable 30-300% construction cost increases caused by pandemic-prompted policies; inflationary and demand-generated exceptional cost increases for materials and labor; and additional, multi-billion-dollar government programs devoted to broadband deployment, which have increased demand for materials and labor and, in some cases, have overbuilt locations awarded in RDOF, thereby further impacting take rates and sustainability for RDOF winners. For these reasons, the Commission should act immediately to ensure RDOF participation remains consistent with the bidders' initial cost assumptions, thereby protecting the integrity and efficacy of the RDOF program.

Respectfully,

Dated: August 16, 2023

/s/ Philip J. Macres

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Counsel for the Coalition of RDOF Winners

Exhibit A

United States Department of Agriculture

Rural Development

Rural Utilities Service

1400 Independence Ave SW
Room 4121 Stop 1590
Washington, DC 20250

Voice 202.720.9556

Notice of Supplemental Funding

Subject: Round 1 and Round 2 ReConnect Supplemental Funding Program

Dear Awardee:

Thank you for your participation in the ReConnect Program through the Rural Utilities Service (RUS). RUS is aware that several Round 1 and Round 2 awardees have been impacted by industry conditions beyond their control.

To assist with the completion of this ReConnect project, RUS will open a **100% Grant with no match** window for all Round 1 and Round 2 awardees. This program window will have a fifty thousand minimum and must be requested by the Authorized Company Representative. The request will need to provide a general description as to the causes of the cost overages and provide an updated budget to complete the project. No expansion or scope growth is allowed; however, the awardee may request an additional year be added to their construction period. All requestees may receive 10% of the total award with additional funds added based on availability.

You have till 12pm ET, December 5th to submit a request for Supplemental Funding/time extension, and it will need to provide the following:

- Awardee Name and Project Designation ID in the subject line
- General summary for Supplemental funding – inflation, environmental, materials, etc.
- Updated Budget
  - Show where additional funds should be added

Submissions should be sent to RD-TelcomProjects@usda.gov, and cc your GFR

If you have questions about the Supplemental Funding process, please contact your local GFR or Shekinah Pepper at shekinah.pepper@usda.gov.

Sincerely,

LAUREL LEVERRIER
Assistant Administrator
Telecommunications Program
Rural Utilities Service