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ALERT

FCC Considers Auction Rules for Rural Digital Opportunity Fund

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The Federal Communications Commission (FCC or Commission) released a Notice of Proposed Rulemaking (NPRM) at its August 1 Open Meeting that seeks comment on establishing a new support mechanism—the Rural Digital Opportunity Fund (RDOF)—that would target support to areas that lack access to 25/3 Mbps broadband service. [1] The NPRM closely follows the framework of its recently completed Connect America Fund (CAF) Phase II auction and proposes a budget of $20.4 billion over a ten-year support term to provide up to gigabit service to unserved Americans through a competitive auction. Comments and reply comments on the NPRM are due at the FCC thirty and sixty days, respectively, from date of publication in the Federal Register, which has yet to occur.

Summary of the RDOF NPRM

Term of Support and Budget

The FCC proposes a term of support of 10 years for the RDOF. The FCC also proposes a budget of $20.4 billion for the RDOF, which is premised on the Connect America Cost Model (CAM) estimated cost of deploying a high-speed broadband network to all locations in wholly unserved price cap census blocks (CBs) that exceed the existing high-cost threshold of $52.50 per-location per-month, and with that cost capped at $198.60. The FCC estimates that there are 3.9 million locations in these CBs and seeks comment on both the budget and its analysis. [2]

The FCC proposes to make available at least $16 billion for Phase I of the RDOF, which it says reflects the sum of the total amount of CAF Phase II model-based support currently received by price cap carriers

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($1.5 billion per year) and the support amount the FCC once envisioned for the Remote Areas Fund (at least $100 million per year). Funding for Phase II will include the remaining $4.4 billion from the total budget, as well as any unawarded funds from Phase I. The FCC seeks comment on its view that the proposed budget will balance the agency's goals of ensuring greater broadband deployment in rural America and reflects efficient use of the Fund. [3]

Multi-Round, Descending Clock Auction

As it did in the CAF II Auction, the FCC proposes to use a substantially similar reverse auction mechanism to distribute support to providers that commit to offer voice and broadband services to fixed locations. It proposes a descending clock auction that will consist of sequential bidding rounds according to an announced schedule providing the start time and closing time of each bidding round. The FCC also proposes to rely on its existing general rules regarding competitive bidding for universal service support, with specific procedures to be developed through the standard Public Notice process. As with the CAF II Auction, the FCC also proposes to simultaneously compare bids to each other for different areas at specified performance tier and latency levels, based on reserve prices, and tier and latency weights. It also proposes to use weights to account for the different characteristics of service offerings that bidders propose to offer when ranking bids. The FCC proposes to include all Phase I eligible areas nationwide – except for the census blocks that are served by price cap carriers that serve noncontiguous areas and elected to receive frozen support – and seeks comment on the appropriate minimum geographic unit for bidding, such as a census blocks, as done in the CAF II Auction, or whether census tracts or counties are more appropriate. [4]

Deployment Obligations

As it did in the CAF II Auction, the FCC proposes to permit bids in the Baseline (25/3 Mbps Speeds; and the higher of 150 gigabytes (GB) monthly usage, or the average usage of a majority of fixed broadband customers), Above-Baseline (100/20 Mbps speeds with 2 terabytes (TB) of monthly usage), and Gigabit performance tiers (1 Gbps/500 Mbps speeds with a 2 TB monthly usage allowance). The FCC also proposes to exclude a Minimum performance tier, which was used in the CAF Phase II auction, and required 10/1 Mbps broadband. As reflected in the below table from the NPRM, the FCC also proposes to use weights to reflect its preference for higher speeds, higher usage allowances, and low latency. [5]

Proposed Performance Tiers, Latency, and Weights

Performance Tier	Speed	Monthly Usage Allowance	Weight
Baseline	≥ 25/3 Mbps	≥ 150 GB or U.S. median, whichever is higher	50
Above Baseline	≥ 100/20 Mbps	≥ 2 TB or U.S. median, whichever is higher	25
Gigabit	≥ 1 Gbps/500 Mbps	≥ 2 TB or U.S. median, whichever is higher	0

Latency	Requirement	Weight
Low Latency		

≤ 100 ms

0

High Latency

≤ 750 ms &

MOS ≥ 4

40

Regarding buildout obligations, the FCC proposes that support recipients complete construction and commercially offer voice and broadband service to 40% of the requisite number of locations in a state by the end of the third year of funding authorization, and an additional 20% in subsequent years, with 100% by the sixth year. As an alternative, it seeks comment on whether to require support recipients to build out more quickly earlier in their support terms by offering voice and broadband to 50% of the requisite number of locations in a state by the end of the third year of funding authorization. [6] As reflected in the below table, the FCC also proposed to apply the same non-compliance measures that are applicable to all high-cost ETCs under its CAF Phase II auction framework.

Non-Compliance Framework

Compliance Gap

Non-Compliance Measure

Tier 1: 5% to less than 15% required number of locations

Quarterly reporting

Tier 2: 15% to less than 25% required number of locations

Quarterly reporting + withhold 15% of monthly support

Tier 3: 25% to less than 50% required number of locations

Quarterly reporting + withhold 25% of monthly support

Tier 4: 50% or more required number of locations

Quarterly reporting + withhold 50% of monthly support for six months; after six months withhold 100% of monthly support and recover a percentage of support equal to compliance gap plus 10% of support disbursed to date

Additional Performance Targets

In a change from its approach in the CAF II Auction framework, the FCC seeks comment on

a proposal to also adopt subscribership milestones for RDOF support recipients, and whether to condition a portion of the recipient's support on meeting the subscribership milestones. As an example, it asks whether it should set milestones at 70% (the subscribership level assumed by the CAM) of the yearly deployment benchmarks. Under this approach, the first subscribership benchmark could be 28% in year three, and increase 14% each year through year six, where it could remain at 70% through the end of the term of support. It also asks whether a subscribership rate that is lower than 70% would be more appropriate to account for the unique challenges of serving rural areas. [7]

Areas Eligible for the Phase I and Phase II Auctions

The FCC proposes to target RDOF support to areas that lack access to both fixed voice and 25/3 Mbps broadband services in two stages. For Phase I, it proposes to target census blocks that are wholly unserved with broadband at speeds of 25/3 Mbps. [8] For Phase II, it proposes to target census blocks that it later determines are only partially served through its Digital Opportunity Data Collection, [9] as well as census blocks unawarded in the Phase I auction. Noting that it will seek comment on how best to target Phase II support as it gathers more granular data on where broadband has been actually deployed, its NPRM focuses on the areas eligible for Phase I of the auction.

The FCC proposes to make several areas initially eligible for Phase I of the RDOF auction, to include CBs: 1) for which price cap carriers currently receive CAF Phase II model-based support; 2) that were eligible for, but did not receive, winning bids in the CAF Phase II auction; 3) where a CAF Phase II auction winning bidder has defaulted; 4) excluded from the offers of model-based support and the CAF Phase II auction because they were served with voice and broadband of at least 10/1 Mbps; 5) served by both price cap carriers and rate-of-return carriers to the extent that census block is in the price cap carrier's territory; 6) that are currently unserved outside of price cap carriers where there is no certified high-cost ETC providing service (*e.g.*, the Hawaiian Homelands), and any other populated areas unserved by either a rate-of-return or price cap carrier; and 7) identified by rate-of-return carriers as ones where they do not expect to extend broadband (as we did with the CAF Phase II auction). For all CBs on the initial list of eligible areas, the FCC proposes to exclude those where a terrestrial provider offers voice and 25/3 Mbps broadband service, using the most recent publicly available FCC Form 477 data to identify these areas. [10]

Reserve Prices

For Phase I of the RDOF auction, the FCC proposes to use the CAM to determine the reserve prices and number of locations for each area eligible for support in the auction. The CAM uses a combination of commercial data and census data to determine the number of residential and small business locations within each census block. The FCC used the same data to determine the deployment obligations in a state for CAF Phase II model-based support as well as the number of locations and reserve prices for the CAF Phase II auction. In establishing reserve prices, the FCC seeks to set area-specific reserve prices that are high enough to promote participation and competition in the auction, but not so high as to violate its commitment to fiscal responsibility.

In a change from the draft item, the FCC seeks comment on prioritizing support to certain eligible areas where broadband is significantly lacking, particularly areas entirely lacking 10/1 Mbps or better fixed service, either at the census block or census block group level. To prioritize support, it seeks comment on setting a reserve price for such areas that is higher than that based strictly on the model, such as a 10% increase to give bidders a sufficiently greater incentive to bid for support for those areas. [11]

Tribal Bidding Credit

It also seeks comment on including a Tribal bidding credit to incentivize parties in the RDOF auction to bid on and serve Tribal census blocks. It therefore asks whether a Tribal bidding credit is an appropriate approach for incentivizing parties to serve Tribal lands, and if such an approach is adopted, seeks comment on the appropriate credit to incentivize carriers to bid on and serve these areas. It notes its prior adoption of a 25% bidding credit for the Rural Broadband Experiments and bidding credits ranging from 15% to 35% in the context of spectrum auctions, and asks whether a 25% bidding credit for rural Tribal areas would be appropriate or whether it should select a different amount. [12]

Application Process

The NPRM also seeks comment on several administrative aspects of its RDOF auction, to include Short-Form Applications, Long-Form Applications, Auction Forfeitures, Letters of Credit, and Eligible Telecommunications Carrier (ETC) Designations. With respect to Short Form Applications, the FCC proposes to largely follow the process established for the CAF II Auction. That process required auction applicants to provide information on ownership, technical and financial qualifications certification, the types of technologies that will be used to provide service for each bid, whether it intends to use spectrum to deploy services (and if so, the spectrum band(s) and total amount of uplink and downlink bandwidth (in megahertz) that it has access to for the last mile for each performance tier and latency combination it selected in each state), the applicant's operational experience and financial qualifications to participate in the RDOF auction, and a due diligence certification. The FCC also seeks comment on whether to require less technical and financial information at the short-form stage from applicants that are existing providers, which it proposes to define as an entity that has been offering a voice and/or broadband service for a certain period of time as demonstrated by its FCC Form 477 data. [13]

Price Cap Transitions – Legacy High-Cost Support

The FCC also seeks comment on how to transition incumbent price cap carriers from CAF I legacy high-cost support and CAF Phase II model-based support in areas in areas where RDOF support is awarded. For legacy high-cost support, the FCC proposes subsequent funding mechanisms under four scenarios. First, it proposes that an incumbent price cap carrier currently receiving disaggregated legacy support will no longer receive such support in any census block that is deemed ineligible for the RDOF. Second, where an incumbent price cap carrier is receiving disaggregated legacy support and it becomes the authorized RDOF recipient, the FCC proposes that the incumbent price cap carrier will cease receiving disaggregated legacy support the first day of the month after the price cap carrier is authorized to receive RDOF support.

Similarly, in areas where an incumbent price cap carrier is receiving disaggregated legacy support and another long-form applicant is authorized to receive RDOF support, it proposes that the incumbent price cap carrier will cease receiving disaggregated legacy support the first day of the month after that long-form applicant is authorized to receive RDOF support. Finally, if no long-form applicant is authorized to receive RDOF support in an area, the FCC proposes that the incumbent price cap carrier receiving disaggregated support in that area would continue to receive such support until further action by the FCC. The FCC seeks comment on these proposals and on whether any adjustments should be made for the transition from disaggregated legacy support to RDOF support. [14]

Price Cap Transitions – CAF Phase II Model-Based Support Transition Period

The NPRM also addresses a mechanism for transitioning incumbent price cap carriers from CAF II model-based support which ends at the end of 2020. Under the existing framework, where a price cap carrier was a winning bidder in the CAF II auction, it would commence receiving the auction support in 2021, after the model-based support term ended at the end of 2020. Conversely, if the price cap carrier did not win in the auction or chose not to bid, it would have the option of electing one additional year of support, with CAF Phase II model-based support continuing in calendar 2021.

Since the RDOF auction is unlikely to conclude before model-based support for price cap carriers is expected to end, the FCC seeks comment on whether to revisit the transition period from CAF Phase II model-based support to RDOF support. As a threshold matter, the NPRM seeks comment on which price cap carriers should be eligible for the optional seventh year of support. Since the optional support year was only to be made available to price cap carriers that did not bid or did not win support in the subsequent auction, the NPRM notes that by the end of 2020, the FCC may not know which price cap carriers fall in these categories.

Given this timing issue, the FCC seeks comment on how to adjust the offer of an optional seventh year of support. For example, it asks whether such support should be available to all price cap carriers until the completion of the RDOF Phase I auction, or only until a specific time (*e.g.*, June 30, 2021) with the remaining six months available only to price cap carriers that are not support recipients in the Phase I auction. It also asks whether a full year of support in 2021 is appropriate or whether the FCC should reduce the support to some lesser amount. [15] In another change from the draft item, the FCC seeks comment on facilitating the transition from CAF Phase II model-based support to RDOF support to ensure that consumers retain access to voice and broadband services that are reasonably comparable to those offered in urban areas. [16]

For more information, contact one of the Wiley Rein authors listed on this alert.

[1] *Rural Digital Opportunity Fund, Connect America Fund*, Notice of Proposed Rulemaking, WC Docket Nos. 19-126, 10-90, FCC 19-77 (2019) (*RDOF NPRM*).

[2] *RDOF NPRM*, ¶¶ 15 – 18.

[3] *Id.*, ¶ 17.

[4] *Id.*, ¶¶ 18 – 22.

[5] *Id.*, ¶¶ 23 – 27.

[6] *Id.*, ¶ 28.

[7] *RDOF NPRM*, ¶¶ 41 – 42.

[8] *Id.*, ¶ 40.

[9] *Establishing the Digital Opportunity Data Collection, Modernizing the FCC 477 Data Program*, WC Docket Nos. 19-195, 11-10, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 19-79 (adopted Aug. 1, 2019). The Digital Opportunity Data Collection will collect geospatial broadband coverage maps from fixed broadband Internet service providers of areas where they make fixed service available. This geospatial data will facilitate development of granular, high-quality fixed broadband deployment maps, which should improve the FCC's ability to target support for broadband expansion through the agency's Universal Service Fund programs.

[10] *RDOF NPRM*, ¶ 46.

[11] *Id.*, ¶¶ 54 – 61.

[12] *Id.*, ¶¶ 62 – 64.

[13] *Id.*, ¶¶ 65 – 93.

[14] *RDOF NPRM*, ¶¶ 95 – 99.

[15] *Id.*, ¶¶ 100 – 103.

[16] *Id.*, ¶ 104.