

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

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
ETC Annual Reports and Certifications)	WC Docket No. 14-58
)	
Rural Broadband Experiments)	WC Docket No. 14-259

To: The Commission

**JOINT PETITION FOR RECONSIDERATION
OF THE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
AND THE UTILITIES TECHNOLOGY COUNCIL**

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EXECUTIVE SUMMARY

NRECA and UTC seek reconsideration of the decision in the *Report and Order* adopted on May 25, 2016, to exclude certain census blocks from being eligible for funding in the Phase II auction, including census blocks (i) included in non-winning Category 1 applications under the Rural Broadband Experiments, and (ii) where the price cap carriers turned down the offer of model-based support and are offering 10/1 Mbps service. This decision is contrary to policy and procedure.

The decision to exclude these census blocks from the Phase II auction was made without adequate notice in violation of the Administrative Procedure Act. In its *December 2014 Connect America Order*, the Commission stated that areas that were served by an unsubsidized competitor with 10/1 mbps would be ineligible for funding in the Phase II auction, and that the Commission would update the list of eligible census blocks based upon recently filed FCC Form 477 data in the coming year. However, the Commission did not indicate that this would exclude census blocks in qualified, non-winning Category I applications. To the contrary, the Commission stated in the *December 2014 Connect America Order* that those census blocks would be eligible for funding in the Phase II auction.

Nowhere in the *December 2014 Connect America Order* did the Commission indicate that it would exclude those census blocks from eligibility if subsequently served with 10/1 mbps service. In fact, the Commission explained at length that the reason that these census blocks would be removed from the offer of model based support and made eligible in the Phase II auction was *because* the Category 1 applications proposed speeds that were far greater than 10/1 mbps at funding levels below model-based support levels. There was no indication that those census blocks would be rendered ineligible based upon updated FCC Form 477 data that showed that those census blocks subsequently were served with 10/1 mbps speeds.

This decision pulls the rug out from under applicants that deployed rural broadband networks based on the good faith expectation that they would be able to compete in the Phase II auction for access to funding to cover the cost of their deployment. It removes from the Phase II auction 631 census blocks (\$22+ Million in maximum support over 10-years) in Missouri and 600 census blocks (\$18+ Million in maximum support over 10-years) in Arkansas. There are adverse impacts in other states, as well.

This decision sends the wrong message to anyone who is considering deploying broadband now instead of later. It is inequitable to provide ongoing subsidies to the price cap carriers who accepted the offer of model-based support and to deny competitive entities the opportunity to bid for funding in areas where they are proposing to provide Category 1 rural broadband experiments. As such, the Report and Order is contrary to Commission policy, because it frustrates the purpose of the rural broadband experiments to challenge the status quo; it discourages broadband deployment in unserved areas; and it denies competitive entities an equal opportunity to access funding to provide broadband service.

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Pursuant to Section 1.429 of the Commission’s rules,¹ the National Rural Electric Cooperative Association (NRECA) and the Utilities Technology Council (UTC) seek reconsideration of the decision in the Report and Order and Further Notice of Proposed Rulemaking adopted on May 25, 2016,² to exclude census blocks in non-winning Category 1 bid rural broadband experiment applications in which (i) a price cap carrier serves with speeds of at least 10/1 Mbps or (ii) an unsubsidized competitor provides service, based on recent Form 477 data.³

NRECA is the national service organization for more than 900 not-for-profit rural electric cooperatives that provide electric energy to approximately 42 million people in 47 states or approximately 12 percent of electric customers. Rural electric cooperative infrastructure covers

¹ 47 C.F.R. § 1.429 (2015).

² *Connect America Fund et al.*, WC Docket No. 10-90 et al, Report and Order and Further Notice of Proposed Rulemaking, FCC 16-64, rel. May 26, 2016 (“*Report and Order*”).

³ *Id.* ¶¶ 70 and 72, n. 144.

75% of the land mass of the United States. NRECA's members include approximately 65 Generation and Transmission ("G&T") cooperatives and 840 Distribution cooperatives. Rural electric cooperatives were formed to provide safe, reliable electric service to their member-owners at the lowest reasonable cost. Rural electric cooperatives are dedicated to improving the communities in which they serve; management and staff of rural electric cooperatives are active in rural economic development efforts. Electric cooperatives are private, non-profit entities that are owned and governed by the members to whom they deliver electricity. Electric cooperatives are democratically governed and operate according to seven Cooperative Principles.⁴

Created in 1948, UTC is the global trade association for the telecommunications and information technology interests of electric, gas and water utilities and other critical infrastructure industries ("CII"), such as pipeline companies.⁵¹ Its members include large investor-owned utilities that serve millions of customers, often across multi-state service territories; and its members include smaller cooperative or municipal utilities that may serve only a few thousand customers in rural areas or isolated communities. All of these members own, manage or control extensive private internal communications networks that they use to support the safe, reliable and efficient delivery of essential services to the public at large. These communications networks are used both for voice and data communications for routine dispatch as well as emergency response during service restoration in the aftermath of hurricanes, storms and other natural disasters, which can affect large areas for extended periods.

⁴ The seven Cooperative Principles are: Voluntary and Open Membership, Democratic Member Control, Members' Economic Participation, Autonomy and Independence, Education, Training and Information, Cooperation among Cooperatives, and Concern for Community.

⁵ See www.utc.org.

DISCUSSION

A. The Decision to Exclude Census Blocks in Qualified Non-Winning Category 1 Applications Significantly Disadvantages Communities Served by Rural Utilities

Rural electric cooperatives and other electric utilities are deploying future-proof broadband networks and providing robust, reliable and affordable broadband services in previously unserved areas, extending broadband to all locations in their electric service areas and to surrounding communities. They recognize that deploying future-proof broadband networks will help drive economic growth, better jobs, improved health care and richer educational opportunities. They are deploying broadband networks because if they do not, no one else will. Rural electric cooperatives and other electric utilities are providing broadband that is not only reasonably comparable to, but often vastly superior to, and less expensive than what the price cap carriers offer to many of their customers.

It is not surprising that over 100 rural electric cooperatives and other electric utilities filed “expressions of interest” to secure funding under the Commission’s Rural Broadband Experiments program. Approximately eighteen (18) rural electric cooperatives filed applications for rural broadband experiment funding that met the Commission’s technical and financial requirements. Of these, four (4) have received funding (three of these four applicants filed Category 1 applications) and the others are next-in-line Category 1 bidders. All of these applicants confirmed “their interest in remaining under consideration under the program.”⁶

Unfortunately, the FCC decided – suddenly and without prior notice – to eliminate certain census blocks from eligibility based upon recent FCC Form 477 data. The chart below

⁶ *Wireline Competition Bureau announces Entities under Consideration as Next-in-Line Bidders for Rural Broadband Experiments Support*, WC Docket Nos. 10-90, 14-259, Public Notice, DA 15-157, Attachment A (Wireline Comp. Bur. rel. February 3, 2015).

depicts the potential funding and the significant number of census blocks included in five (5) of the qualified, non-winning Category 1 applications submitted by rural electric cooperatives that will be removed from the Phase II auction as a result of the decisions in the *Report and Order*:

Census Blocks Removed From the CAF II Auction

Cooperative	Original RBE bid blocks	Blocks removed from RBE	Removed CAM- based annual support	10-Year potential support removed
Ozarks	1358	95	\$420,209	\$4,202,090
North Arkansas	1979	505	\$1,389,505	\$13,895,050
Co-Mo	1014	631	\$2,263,563	\$22,635,630
Midwest Energy	669	150	\$294,538	\$2,945,380
Georgia Comm. Coop.	608	238	\$511,827	\$5,118,270
TOTALS	5628	1619	\$4,879,642	\$48,796,420

The aggregate totals of census blocks and potential funding removed could be noticeably higher.

Some of these qualified, non-winning Category 1 applicants are effectively being penalized for deploying broadband networks prior to the Phase II auction; and others are being discouraged from deploying broadband in areas where the price cap carriers are providing 10/1 Mbps service. UTC and NRECA are filing this Petition for Reconsideration so that all rural electric cooperatives and other electric utilities may participate fully in the Phase II auction, consistent with the Commission’s previous decisions on rural broadband deployment generally and the Phase II auction in particular.

B. The Commission Failed to Provide Notice and Meaningful Opportunity to Comment on the Exclusion of Rural Broadband Experiment Census Blocks from the Phase II Auction in Violation of Section 553 of the Administrative Procedure Act

Prior to the *Report and Order*, the Commission requested comment, evaluated options and explained in considerable detail its decision to exclude census blocks included in qualified non-winning Category 1 applications from the model-based offers and to include these census blocks in the Phase II auction. Consideration of this issue began in earnest in the *April 2014*

Connect America Further Notice,⁷ as the Commission elicited comment on a series of issues associated with the state-wide offers and competitive bidding, including the competitive bidding process, the areas that would be eligible for Phase II support, eligible telecommunications carrier (ETC) designations, and flexibility in meeting deployment obligations. One issue on which the Commission sought input was the “interplay” between the Rural Broadband Experiments and offers for model-based support, including under “what conditions a rural broadband experiment formal proposal would have to meet in order to remove a geographic area from a price cap carrier’s state-level commitment.”⁸ Noting that many applicants for Rural Broadband Experiment funding proposed to deploy fiber to the premises, the Commission inquired whether “removing such areas from the state level commitment [would] result in greater deployment of broadband in high cost areas” than under the then current Connect America framework.⁹

Upon considering an extensive record, the Commission deferred some issues and resolved others in its *December 2014 Connect America Order*.¹⁰ One issue that was resolved clearly and unequivocally was the “interplay” between the rural broadband experiments and the Phase II auction. At some length, the Commission explained its decision that census blocks included in qualified non-winning Category 1 applications would be excluded from the state-wide offers and included in the Phase II auction:

We conclude that excluding from the offer of model-based support any census block included in a non-winning rural broadband experiment application submitted in funding category one will ensure the more efficient use of Connect America support.¹¹

⁷ *Connect America Fund et al.*, Report and Order, et. al., 29 FCC Rcd 7051 (2014) (“*April 2014 Connect America Further Notice*”).

⁸ *Id.* ¶ 221.

⁹ *Id.* ¶ 222.

¹⁰ *Connect America Fund et al.*, Report and Order, 29 FCC Rcd 15644 (2014) (“*December 2014 Connect America Order*”).

¹¹ *Id.* ¶ 84.

[E]xcluding these areas from the offer of model-based support and instead making them available in the Phase II competitive bidding process should enable us to stretch our finite Connect America budget even further.¹²

This decision also reflects our balancing of section 254(b) principles under the circumstances here. In the *USF/ICC Transformation Order*, the Commission concluded — and we now reaffirm — that the CAF should ultimately rely on market-based mechanisms, such as competitive bidding, to ensure the most efficient and effective use of public resources.¹³

Thus, after notice and full opportunity for comment, the Commission added the census blocks in non-winning Category 1 applications to the Phase II auction in the *December 2014 Connect America Order*.

Subsequently, no petitions for reconsideration of this decision were filed nor did the Commission elicit further comment on the decision. For over one year leading up to the current *Report and Order*, interested parties submitted proposals and engaged in *ex parte* discussions looking toward finalizing the rules for the Phase II competitive bidding process. During this entire period, the Commission did not provide any indication whatsoever that it was considering removing these census blocks from the Phase II auction; rather, consistent with *December 2014 Connect America Order*, the Commission calculated the aggregate funds that would be available for the Phase II auction taking into account all of the census blocks included in the qualified, non-winning Category 1 applications.¹⁴

In its *Report and Order*, the Commission claims that it provided notice, when it stated in its *December 2014 Connect America Order* that “[w]e expect to update the list of census blocks that will be excluded from eligibility from the Phase II competitive bidding process based on the most current data available at the time shortly before that auction to take into account any new

¹² *Id.* ¶ 85.

¹³ *Id.* ¶ 87 (*internal quotations omitted*).

¹⁴ *Report and Order* ¶¶ 77 and 79.

deployment that is completed in the coming year.”¹⁵ However, this statement was made separate and apart from the text of the section of the *December 2014 Connect America Order* that describes the eligibility of the census blocks in non-winning applications for Category 1 rural broadband experiments (i.e. the carve-out from the price cap carrier offer of model-based support). Moreover, there was no indication that those census blocks in the carve-out for the rural broadband experiments could become ineligible, based upon subsequent FCC Form 477 data.

Without question, the decision in the *Report and Order* to remove these census blocks violates both the letter and spirit of Section 553 of the Administrative Procedure Act.¹⁶ The D.C. Circuit’s recent decision affirming the *Open Internet Order* underscores this point. Among other arguments, the court considered and rejected USTelecom’s argument that the Commission’s reclassification of Broadband Internet Access Service as a “telecommunications service” was made without notice and meaningful opportunity for comment. The court concluded sufficient notice was provided as the underlying Notice of Proposed Rulemaking “expressly asked for comments” on whether the Commission should reclassify broadband.¹⁷ The court’s summation of the applicable law on adequate notice of proposed agency action is instructive:

Under the APA, an NPRM must “provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.” *Honeywell International, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (internal quotation marks omitted). The final rule, however, “need not be the one proposed in the NPRM.” *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013). Instead, it “need only be a ‘logical outgrowth’ of its notice.” *Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006). An NPRM satisfies the logical outgrowth test if it “expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is]

¹⁵ *Report and Order* at ¶55, citing *December 2014 Connect America Order*, 29 FCC Rcd at 15674, para. 80.

¹⁶ 5 U.S.C. §553 (2012).

¹⁷ *United States Telecom Association, et al. v. Federal Communications Commission and United States of America*, No. 15-1063, 2016 WL 3251234 (D.C. Cir. June 14, 2016).

contemplating a particular change.” *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1081 (D.C. Cir. 2009).¹⁸

With regard to the *Report and Order’s* decision to exclude a substantial number of census blocks in qualified, non-winning Category 1 applications from the Phase II auction, the Commission failed this test. There was no opportunity for “interested persons to comment meaningfully” on the possible removal of these census blocks from the Phase II auction. Nor was the Commission’s decision a “logical outgrowth” of a prior notice, because there was no notice at all. Moreover, the Commission otherwise never made clear it was “contemplating [this] particular change.”

C. Excluding These Census Blocks Is Problematic From Multiple Perspectives

Many applicants acted in good faith in response to the decision in the *December 2014 Connect America Order* to include census blocks from qualified, non-winning Category 1 applications in the Phase II auction. All committed substantial resources to preparing and submitting their Category 1 applications, including the development of network plans that satisfied the Commission’s technical requirements. Some focused on additional planning, preparations and due diligence. Others moved forward with deployment of high capacity broadband networks in an effort to meet the pressing demand for fixed broadband service in their communities. These steps were undertaken with the knowledge that there was no guarantee these rural electric cooperatives would receive funding from the Connect America Fund, but with the understanding that they would have the opportunity to participate fully in the Phase II auction.

¹⁸ *Id.* at 29-30.

The decision in the Report and Order that significantly reduces the scope of rural electric cooperatives' opportunity to pursue funding under the Phase II auction is ill-conceived from a number of perspectives. The notion that census blocks in non-winning, qualified Category 1 applications should be excluded from the Phase II auction because of limited broadband deployment being undertaken without CAF II support is beyond the pale. The support made available under the Connect America Fund—both the state-wide offers to the price cap carriers and the funding available under the Phase II auction—were and are being offered as operating subsidies. The Commission never indicated that in order to obtain CAF II funding broadband providers would be obligated to “place a hold” on either the planning or the deployment of high capacity broadband networks in rural areas until after they received funds or were determined to be winning bidders. Indeed, the timely deployment of broadband networks is a fundamental priority under the state-wide offers and the projects to be funded under the Phase II auction.¹⁹

The state-wide offers extended to price cap carriers were developed on the basis of the number of high cost census blocks in their service territories;²⁰ state-wide offer funding was not reduced to the extent price cap carriers already provided 10/1 Mbps service in these census blocks. Yet inexplicably, the Report and Order excludes census blocks from non-winning Category 1 applications from the Phase II auction in which the price cap carrier offers 10/1 Mbps. This applies even though the Baseline Performance Tier adopted in the Report and Order is 25/3 Mbps with two higher performance tiers,²¹ all well above 10/1 Mbps. The effect of this

¹⁹ *Report and Order* ¶¶ 38-41. CAF II-supported networks under state-wide offers and competitive bidding are subject to the same six-year deployment schedules.

²⁰ The *Report and Order* changes determining a census block's eligibility for the Phase II auction based on averaging costs at the census block level. *Id.* ¶ 64. This should not materially change the aggregate census blocks originally included in the state-wide offers and the Phase II auction.

²¹ *Id.* ¶ 24.

decision is a perpetuation of the “digital divide” between rural and urban areas, an end-result that the Commission has worked hard to overcome.

Excluding census blocks from qualified, non-winning Category 1 applications that are served by price cap carriers offering 10/1 Mbps service raises another concern. Price cap carriers have shown a reluctance to maintain and/or upgrade service in rural areas absent significant support. Rural communities have witnessed this phenomenon time and again. NRECA and UTC are deeply concerned that this scenario will play out all too often over the next ten years. Many of the price cap carriers have extensive urban, suburban and rural service territories in multiple states and are part of major telecommunications conglomerates having multiple lines of business (wireless, video, content, and national and international enterprise services). In order to maximize returns to shareholders, these companies pursue business opportunities that they project will provide the highest reasonably achievable returns. Absent USF subsidies, price cap carriers are not obligated to continue to offer and may discontinue the provision of Broadband Internet Access Service in specific markets as their business plans dictate, all to the collective detriment of rural America.²²

²² *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 509 (2015). Even though the Commission reclassified Broadband Internet Access Services as a telecommunications service, the Commission exercised its forbearance authority exempting broadband providers from the service discontinuance requirements under Section 214 of the Communications Act.

D. Excluding a Significant Number of Census Blocks in Qualified, Non-Winning Category I Applications From the Phase II Auction is Arbitrary and Capricious Agency Action

The Further Notice highlights equity concerns that have been raised over the possible loss of CAF II funds in states in which the price cap carrier declined state-wide offers.²³ A more compelling concern is that the Commission is funding price cap carriers under state-wide offers to provide 10/1 Mbps, but is limiting significantly the opportunity for qualified, non-winning Category 1 applicants to participate in the Phase II auction even though these applicants are either providing or have proposed to provide robust broadband service consistent with the Commission's unambiguous guidance and direction.

An underlying purpose of the Connect America Fund is to bridge the broadband "digital divide" that exists between rural and urban communities. The Rural Broadband Experiments and the Phase II auction were intended to alter the status quo of broadband deployment in rural America. Under the Phase II auction, qualified bidders must submit competitive bids to deliver broadband service that provides a far better value to rural communities than 10/1 Mbps service supported at CAM-based rates. Indeed, the Commission reasonably anticipated bids for fiber to the premises networks that would be less than the CAM-based rates.

The decision by the Commission in the Report and Order that is the subject of this Petition for Reconsideration does the opposite: it locks-in the status quo for the rural communities located in the affected census blocks. That qualified, non-winning Category 1 applicants are now being penalized by excluding census blocks from the Phase II auction because these applicants "did the right thing" either by deploying or proposing far more robust broadband networks prior to the Phase II auction is arbitrary and capricious agency action. A far

²³ *Further Notice* ¶¶ 217-224.

better outcome in terms of Commission policy objectives is to include these census blocks in the Phase II auction as envisioned in the *December 2014 Connect America Order*.

CONCLUSION

Accordingly, NRECA and UTC respectfully request that the Commission grant their Joint Petition for Reconsideration and include in the Phase II auction all census blocks in qualified, non-winning Category 1 applications in which either (i) a price cap carrier serves with speeds of at least 10/1 Mbps, or (ii) an unsubsidized competitor provides service, based on recent Form 477 data, and take other action consistent with the views expressed herein.

Respectfully submitted,

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