**Before the**
**RURAL UTILITIES SERVICE**
**U.S. DEPARTMENT OF AGRICULTURE**
**Washington, DC 20250**

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| **In the Matter of** | ) | |
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| **Broadband e-Connectivity Pilot Program** | ) | **Docket No. RUS-18-TELECOM-0004** |
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**COMMENTS OF**
**ITTA – THE VOICE OF AMERICA'S BROADBAND PROVIDERS**

ITTA – The Voice of America's Broadband Providers (ITTA) hereby submits its comments in response to RUS's *NOI and RFC* on the implementation of certain provisions of its pilot broadband program (e-Connectivity Pilot) to expand rural broadband infrastructure in unserved rural areas and tribal lands.[1]

## I. INTRODUCTION

The members of ITTA provide a broad range of high-quality broadband, wireline and wireless voice, video, and other communications services on a wholesale and retail basis to residential and business customers in predominantly rural areas across almost all 50 states. ITTA's members are literally in the trenches effectuating broadband deployment in rural America. ITTA vigilantly pursues federal government policies that promote and support broadband deployment to currently unserved and underserved areas in accordance with

[1] Rural Utilities Service, U.S. Department of Agriculture, Broadband e-Connectivity Pilot Program, 83 Fed. Reg. 35609 (July 27, 2018) (*NOI and RFC*). *See* Consolidated Appropriations Act of 2018, Pub.L. No. 115-141, § 779 (2018) (2018 Appropriations Act); U.S. Department of Agriculture, *USDA Launches Webpage Highlighting Resources to Help Rural Communities Bridge the Broadband e-Connectivity Infrastructure Gap* (Aug. 29, 2018) (USDA e-Connectivity Webpage Launch Announcement), https://www.usda.gov/media/press-releases/2018/08/29/usda-launches-webpage-highlighting-resources-help-rural-communities.

Congress' directive to encourage the deployment of broadband *to all Americans*.[2] ITTA welcomes the opportunity to comment on the *NOI and RFC*, and looks forward to working with RUS on an ongoing basis to help identify ways to maximize the rural broadband deployment benefits that the e-Connectivity Pilot is intended to foster.

In this regard, ITTA urges RUS to undergird the e-Connectivity Pilot with five fundamental tenets. Pursuant to the 2018 Appropriations Act's requirement that the e-Connectivity Pilot not fund projects that overbuild or duplicate "broadband expansion efforts," RUS should adopt program rules that construe broadband expansion efforts broadly. In addition, program rules should safeguard the principle of competitive neutrality. However, RUS should recognize the benefits of awarding grants or loans to experienced, proven broadband providers, and should ensure that all program applicants demonstrate their financial wherewithal and technological capability to complete projects funded by the e-Connectivity Pilot.

In order to maximize program success and prevent overbuilding, RUS should rely on more current data sources than the National Broadband Map.

## II. RUS SHOULD ENSURE e-CONNECTIVITY PILOT FUNDS DO NOT SUPPORT OVERBUILDING

Section 779 of the 2018 Appropriations Act provides that "an entity to which a loan or grant is made under the pilot program shall not use the loan or grant to overbuild or duplicate broadband expansion efforts made by any entity that has received a broadband loan from the Rural Utilities Service." Although the statutory language specifically mentions the efforts of entities that have previously received RUS broadband loans, it does not preclude RUS from denying funding to overbuild or duplicate broadband expansion efforts by other entities

[2] *See* 47 U.S.C. § 1302 (codifying, within Title 47 of the United States Code, Section 706 of the Telecommunications Act of 1996 (1996 Act)); *see also* American Recovery and Reinvestment Act of 2009, Pub.L. No. 111-5, § (6001)(k)(2)(D), 123 Stat. 115, 516 (2009) (national broadband plan to ensure that "all people of the United States" have access to broadband capability).

providing "sufficient access to broadband,"[3] such as those receiving federal and/or state support for broadband deployment,[4] and those that have deployed sufficient broadband access to the subject area without federal or state government subsidies. Simply put, RUS can and should refrain from providing any grant or loan to any project under the e-Connectivity Pilot proposing to overbuild or duplicate deployment in any rural area with sufficient broadband access as defined by Section 779.

Contouring e-Connectivity Pilot project eligibility in this manner not only is fully permissible under the 2018 Appropriations Act, it also is sound policy. In order to help truly realize Congress' vision of universal broadband access by all Americans, in all regions of the nation, any funding via the program should flow to areas currently lacking sufficient access to broadband services. The legislation's prohibition on overbuilding or duplication wisely recognizes that national broadband policy will be better promoted by prioritizing deployment to rural areas with insufficient access to broadband before enhancing networks or introducing new providers in areas that already enjoy sufficient access. With 24 million Americans still lacking broadband access, and 80 percent of them living in rural areas and on tribal lands,[5] the e-Connectivity Pilot should be laser-focused on serving the unserved or locations receiving insufficient broadband access, i.e., the underserved. Relatedly, preclusion of overbuilding or duplication via the e-Connectivity Pilot should be construed broadly in order to promote fiscal

[3] *See* 2018 Appropriations Act § 779 (defining eligible rural areas for purposes of the e-Connectivity Pilot as those having at least 90 percent of the households without sufficient access to broadband, itself defined as 10 Mbps downstream, 1 Mbps upstream).

[4] *See* Letter from John Thune, Chairman, Senate Commerce Committee, and Roger F. Wicker, Chairman, Senate Subcommittee on Communications, Technology, Innovation, and the Internet, to Sonny Perdue, Secretary, USDA, at 1 (filed Aug. 22, 2018) (Senate Chairmen Letter) ("It is crucial that RUS plan projects and coordinate the distribution of funds under the pilot program with the FCC, to ensure that the pilot program does not result in overbuilding in areas covered by current and planned [Connect America Fund] deployments.").

[5] *See* USDA e-Connectivity Webpage Launch Announcement.

responsibility, and would best advance "the goal of closing the digital divide by expanding broadband access to all Americans, while ensuring prudent use of taxpayer dollars."[6]

## III. WHILE SAFEGUARDING COMPETITIVE NEUTRALITY, THE e-CONNECTIVITY PILOT SHOULD ENSURE THAT BROADBAND PROVIDERS HAVE THE FINANCIAL WHEREWITHAL AND TECHNOLOGICAL CAPABILITY TO COMPLETE FUNDED PROJECTS

Another fundamental principle guiding implementation of the e-Connectivity Pilot should be competitive neutrality, applied via technological neutrality. In other words, grants or loans should flow to the projects that best meet the program's rural broadband deployment goals and requirements regardless of the technology or technologies employed.

The principle of competitive neutrality is enshrined both within the Communications Act of 1934, as amended (Communications Act),[7] and as a principle adopted under its authority.[8] Although the 2018 Appropriations Act does not subject the e-Connectivity Pilot to any of the provisions of the Communications Act, there is no reason that implementation of the program should not benefit from some of the precepts that have guided administration of the federal universal service program. Both programs share the common goal of fostering broadband deployment to unserved and underserved rural areas and tribal lands.[9] In the universal service context, the competitive neutrality principle requires that universal service support mechanisms

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[6] Senate Chairmen Letter at 1.

[7] *See* 47 U.S.C. § 253.

[8] *See Federal-State Joint Board on Universal Service,* Report and Order, 12 FCC Rcd 8776, 8801-03, paras. 46-52 (1997) (*First Universal Service Order*) (establishing competitive neutrality as a necessary and appropriate policy governing the preservation and advancement of universal service pursuant to Section 254(b)(7) of the Communications Act, 47 U.S.C. § 254(b)(7)).

[9] *Cf.* Senate Chairmen Letter at 1 (under the universal service program, "[t]he FCC has a well-established Connect America Fund (CAF) that is already providing funding to deliver broadband to millions of rural Americans over the next decade.").

and rules "neither unfairly favor nor disfavor one technology over another."[10]

Competitive neutrality, however, does not require all competitors to be treated alike.[11] In applying the concept under the Communications Act, courts have established that competitive neutrality "does not require precise parity of treatment,"[12] and that it "only prohibits . . . treating competitors differently in 'unfair' ways."[13] Thus, establishing competitive neutrality as a foundational e-Connectivity Pilot principle should not preclude RUS from prioritizing applicants that are qualitatively superior under one or more criteria. For instance, a funding applicant that proposes to use a technology offering comparatively superior performance, with respect to speed, latency, or other metrics, should benefit from such superior technological performance when evaluated against competing applicants.[14]

Similarly, it should not be viewed as an affront to competitive neutrality to prioritize providers with a proven body of work in deploying and delivering broadband to rural areas, nor to require applicants without such a track record to undergo a comparatively more stringent evaluation of their financial bona fides before receiving grants or loans under the e-Connectivity Pilot. It is no secret to RUS that successfully deploying and delivering broadband in rural areas

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[10] *First Universal Service Order*, 12 FCC Rcd at 8801, para. 47.

[11] *See Connect America Fund Phase II Auction Scheduled for July 24, 2018; Notice and Filing Requirements and Other Procedures for Auction 903*, Public Notice, 33 FCC Rcd 1428, 1468, para. 105 n.229 (2018) (*CAF II Auction PN*).

[12] *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2002).

[13] *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1104 (D.C. Cir. 2009).

[14] *Cf. CAF II Auction PN*, 33 FCC Rcd at 1468, para. 105 (FCC rejecting claims that precluding some entities from bidding for CAF Phase II universal service support for certain technological performance tier and latency combinations violated competitive neutrality): "[O]ur decision to limit an applicant's ability to select certain performance tier and latency combinations does not negate the Commission's decision to adopt technology-neutral performance standards for the Phase II auction. . . . The principle of competitive neutrality does not preclude us from addressing other reasonable regulatory objectives, including ensuring that an entity . . . is reasonably capable of meeting the relevant Phase II obligations if awarded support. Thus, it does not violate competitive and technological neutrality . . . to rely on our predictive judgment to restrict applicants proposing to use certain technologies…"

requires providers to account for challenges not generally faced by their counterparts serving urban areas, such as distance between locations. Existing providers of rural broadband have, out of necessity, developed and refined experience in how to efficiently construct and engineer their networks to achieve the most deployment feasible to disparate locations within budgets justifying a business case for such deployment. Leveraging the deployment of such providers, as well as their know-how, would maximize the efficiency of the e-Connectivity Pilot, and help to fulfill the legislation's directive that RUS "expedite program delivery methods that would implement" Section 779.[15]

Further, RUS should ensure, prior to disbursing funds under the e-Connectivity Pilot, that program participants are financially qualified to leverage such funds to complete the designated projects, and repay RUS in the case of loans. While RUS certainly has abundant experience with administering grants and loans, as well as implementing safeguards associated with them, such protections are especially critical with the e-Connectivity Pilot, which may entice new, unproven entrants to the rural broadband business.

RUS should require a more stringent up-front demonstration of financial qualifications by entities with fewer than two years of operational experience with voice and/or broadband services in rural America. The comparative showings required of applicants to participate in the FCC's CAF Phase II auction could help to form the basis of a paradigm for RUS to differentiate between proven and unproven applicants in the showings required. An applicant meeting the two-year experience threshold was required to submit its (or its parent company's) financial statements from the prior fiscal year, including balance sheets, net income, and cash flow, that were audited by an independent certified public accountant.[16] If RUS adopts this requirement, it

[15] 2018 Appropriations Act § 779.

[16] *See CAF II Auction PN*, 33 FCC Rcd at 1445, para. 43.

should find such an applicant financially qualified to participate in the program if the statements received an unmodified, non-qualified opinion from the auditor. An applicant not meeting the two-year experience threshold, however, was required to submit with its applications financial statements audited by an independent certified public accountant from the three most recent fiscal years, including balance sheets, net income, and cash flow, as well as a letter of interest from a qualified bank stating that the bank would provide a letter of credit to the applicant if the applicant was selected.[17] Regardless of the actual showing RUS requires, the point is that providers meeting the two-year experience threshold should not be subject to the same rigor in evaluation of their financial qualifications as applicants lacking such experience.

Finally, it is critical that RUS evaluate e-Connectivity Pilot applications with an eye to making sure that the applicant will be able to build and operate facilities that will fully comply with all program requirements, as well as that the depicted broadband services meet reasonable and realistic service parameters, e.g., with respect to speed, latency, and price. Specifically, RUS should ensure that a proposed project's performance characteristics are consistent with the technologies the applicant intends to use.

While a certain technology may eventually be able to meet program performance standards, it would not be wise to allocate funding at this time based on possible future technological advances. Attempting to evaluate speculative, unproven service levels, especially when based on eventual technological advances, would defeat the objectives of assuring that applicants are qualified and that funding will not be squandered on applicants that will leverage the funding inefficiently or fail to finish the project altogether. RUS would either have to rely on a certain level of faith in the applicant's ability to meet by a certain time the obligations attendant to receipt of such funding via the e-Connectivity Pilot, or it would need to commit significant

[17] *See id.* at para. 45.

technical resources towards evaluating the applicant's technological bona fides, imposing undue costs on RUS staff, and potentially delaying disbursement of program funding. This would contravene Congress' directive that RUS expedite program delivery methods that would implement the legislation.[18]

Again here, proven experience and technical expertise in deploying and delivering broadband service to rural America should weigh in an applicant's favor. Just as a threshold of prior experience with providing voice or broadband service should imbue RUS with sufficient assurance of an applicant's financial qualifications, experience with offering certain performance characteristics should likewise provide RUS with confidence in an applicant's ability to continue to provide that level of service.

In contrast, RUS should require detailed technical showings from applicants not meeting the two-year experience threshold. For instance, RUS could require such an applicant to furnish a detailed description of its technology and system design, describing the project, demonstrating its feasibility, and including a project diagram certified by a professional engineer. The showing would need to describe in detail a network that fully supports the delivery of consumer broadband service that meets the program performance requirements, and the professional engineer would need to certify that the project can deliver the described broadband service.[19]

## IV. ANY RUS RELIANCE ON DATA OF THE NATIONAL BROADBAND MAP SHOULD BE AUGMENTED BY OTHER DATA SOURCES

In order to evaluate whether existing service providers provide sufficient broadband access in a proposed service area and thereby assist the e-Connectivity Pilot to avert the funding

[18] *See* 2018 Appropriations Act § 779.

[19] This is similar to the detailed description of technology and system design the FCC requires of winning bidders in the CAF Phase II auction in order to assess their technical qualifications and operational assertions made in their applications. *See CAF II Auction PN*, 33 FCC Rcd at 1514, paras. 298, 300.

of overbuilding in that area, RUS will utilize "the most current data of the National Broadband Map, or any other data regarding the availability of broadband service that may be collected or obtained through reasonable efforts."[20] The *NOI and RFC* also seeks comment on what other data sources should be used.[21]

As an initial matter, the National Broadband Map has not been updated in several years. Therefore, reliance on its data would woefully undercount existing sufficient broadband access.

In the 2018 Appropriations Act, Congress tasked the National Telecommunications and Information Administration (NTIA) with improving the quality and accuracy of broadband availability data. Optimally, such updates would be available in time for RUS to capitalize upon them in implementing the e-Connectivity Pilot.[22] In the event, however, that they are not, RUS should begin by augmenting the National Broadband Map with data amassed by the FCC via its Form 477. Form 477 data are submitted by broadband providers semi-annually, and the Form 477 is "the principal tool used by the Commission to gather data on communications services, including broadband services, to help inform [its] policymaking."[23] Form 477 collects fixed broadband deployment data on the census-block level. In fact, noting that the only current source of nationwide broadband availability data is the FCC Form 477, the *NTIA RFC* seeks "to augment data from the FCC, other federal government agencies, state government, and the private sector" in order to update the National Broadband Map pursuant to Congress' directive in

[20] *NOI and RFC*, 83 Fed. Reg. at 35609.

[21] *See id.*

[22] *See* Senate Chairmen Letter at 1 ("Additionally, the [NTIA] has been charged with updating the maps detailing our nation's current broadband service availability and will be another critical resource as the RUS pilot moves forward.").

[23] *Modernizing the FCC Form 477 Data Program*, Further Notice of Proposed Rulemaking, 32 FCC Rcd 6329, para. 1 (2017).

the 2018 Appropriations Act.[24]

In addition to Form 477 data, RUS may seek to utilize broadband deployment data submitted by providers to the High Cost Universal Service Broadband (HUBB) Portal administered by the Universal Service Administrative Company (USAC). Section 54.316 of the FCC's rules requires rate-of-return carrier recipients of federal universal service support for broadband deployment, price cap carrier recipients of model-based support under the FCC's CAF Phase II program, and winners of CAF Phase II support through competitive bidding to submit geocoded deployment data via the HUBB Portal, and to update HUBB Portal information annually with new deployments.[25] Some of these support recipients additionally are required to file with the HUBB Portal geocoded deployment data for locations served prior to receiving the subject support.[26] The HUBB Portal provides "real-time validation of geolocated broadband deployment data by conducting a series of automated checks of the information."[27]

Both Form 477 data and HUBB Portal data, however, suffer from shortcomings. Form 477 data is beset with data accuracy issues, and there is no independent validation or verification process for the data.[28] HUBB Portal data does not include unsubsidized deployment or the substantial amount of deployment supported by universal service program funding that is not currently required to be retroactively geocoded and submitted to the HUBB Portal. Therefore,

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[24] National Telecommunications and Information Administration, Improving the Quality and Accuracy of Broadband Availability Data, 83 Fed. Reg. 24747, 24748 (May 30, 2018) (*NTIA RFC*).

[25] 47 CFR § 54.316.

[26] *See, e.g.*, *Connect America Fund*, Order, 32 FCC Rcd 1445, 1449, para. 14 (WCB 2017) (clarifying the obligations of rate-of-return carrier model-based support recipients to report "pre-existing" broadband deployment information in the HUBB Portal).

[27] USAC, *HUBB Frequently Asked Questions*, https://www.usac.org/_res/documents/hc/pdf/tools/HC-HUBB-FAQ.pdf (last visited Sept. 7, 2018). The HUBB FAQs further describe the validation measures that the data submitted to the HUBB Portal undergo. *See id.*

[28] *See NTIA RFC*, 83 Fred. Reg. at 24748.

ITTA strongly supports RUS' avowed plans "to allow existing service providers an opportunity to comment if 10 Mbps downstream and 1 Mbps upstream service exists for households in the proposed service area or not."[29]

## V. CONCLUSION

If administered wisely, the e-Connectivity Pilot will make constructive inroads towards further addressing the continued deprivation of millions of Americans located in rural areas and on tribal lands of sufficient broadband access. In order to maximize program outcomes, RUS should construe broadly Section 779's proscription of overbuilding, and evaluate the presence of sufficient broadband access in a given area using more recent data than the National Broadband Map alone. Furthermore, while program rules should be guided by the principle of competitive neutrality, all program applicants need not be treated exactly alike. RUS should recognize the benefits of awarding grants or loans to experienced, proven broadband providers, and examine the applications of inexperienced entities with greater rigor so as to ensure that funded projects will be completed and that program funding is not wasted.

Respectfully submitted,

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[29] *NOI and RFC*, 83 Fed. Reg. at 35609.