July 25, 2024

Chairwoman Jessica Rosenworcel
Federal Communications Commission (FCC)
45 L Street, NE
Washington, DC 20554

RE: Notice of Proposed Rulemaking (NPRM), GN Docket No. 20-32; FCC 24-64

Submitted electronically at *https://www.fcc.gov/ecfs/*.

Dear Chairwoman Rosenworcel:

On behalf of the National Association of Surety Bond Producers (NASBP)[1] and The Surety & Fidelity Association of America (SFAA)[2], we offer comments regarding the proposed rulemaking concerning Section B, paragraph 22, Rural Digital Opportunity Fund (RDOF), Letter of Credit (LOC) Reduction and Section C, paragraph 25, Connect America Fund Phase II (CAF II), Letter of Credit Waiver.

Surety bonds offer an alternative form of security to LOCs

A surety bond is a three-party contract in which a surety company guarantees to a second party (called the "obligee" such as a state broadband office) the successful performance of a contractual obligation by a third party (called the "principal" such as an ISP or its construction contractor). For example, for federal construction contracts exceeding $150,000, the Miller Act (40 USC 3131, et, seq.) requires, among other things, that prime contractors furnish performance bonds to ensure completion of the construction contract, thereby protecting public contracting authorities against contract defaults.

Surety bonds are a time-tested means of financial risk transfer and provide alternative forms of performance security to bank LOCs. A rigorous prequalification process allows a surety company to review, and assess, a bonded principal's (ISP or contractor) financial strengths and organizational capabilities prior to issuing a bond. A surety company will only furnish a bond to businesses it believes are fully qualified and able to successfully perform award obligations. This underwriting process is a crucial step in properly vetting contractors bidding to take on taxpayer-funded infrastructure projects. Such prequalification process is not a component of securing LOCs.

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[1] NASBP is a national trade association whose membership includes firms employing licensed surety bond producers placing bid, performance, payment, and other bonds throughout the United States and its territories.

[2] SFAA is a nonprofit, nonpartisan trade association representing all surety and fidelity industry segments. We promote the value of surety and fidelity bonding and its vital protections through advocacy, outreach, promotion, and education. The more than 425 member companies write 98 percent of surety and fidelity bonds in the U.S. SFAA is also licensed as a rating or advisory organization in all states, and state insurance departments have designated it as a statistical agent for reporting fidelity and surety experience.

Currently, the Commission's only form of security to protect the federal government's financial interest for expanding rural broadband is an LOC. However, based on our historical observations and conversations with the ISP community, smaller ISPs have had, and continue to have, difficulty securing sufficient collateral to obtain LOCs, a fact the proposed rulemaking seems to recognize. The proposed rulemaking even recognizes the difficulty the ISP community is facing in securing LOCs from banks meeting your current qualification requirements. These situations, along with the weakening in bank credit quality, precipitated the announcement from National Telecommunications & Information Administration (NTIA) of the U.S. Department of Commerce to accept surety bonds as an additional form of security for its Broadband Equity Access and Deployment (BEAD) Program.

By recognizing surety bonds as an additional form of security under the RDOF and CAF II programs, the Commission can avoid having to alter either, while bringing both in line with other existing federal programs and achieving its goal of reducing financial burdens on participants.

Rather than adopting a new system to evaluate the health and suitability of a bank due to the reduced availability of LOCs in the marketplace and potentially sacrificing the protection of public funds, we urge the Commission to consider surety bonds as another form of security to protect public funds disseminated under the RDOF and CAF II programs.

Surety bonds, which do not rely on fluctuating rating systems, can be structured to provide flexibility the Commission is seeking to reduce financial burdens on small business ISPs seeking the opportunity to participate in broadband projects, while simultaneously providing full project coverage. Small businesses that otherwise may be precluded from participation because of the diminishment in their working capital tied up in LOCs, which in turn may affect the deployment of internet services, may have greater access to these programs.

Surety Industry Responds

To support NTIA, NASBP and SFAA developed performance bond forms and model language to facilitate the use of surety bonds to meet the BEAD Program security requirements. The Surety Working Group developed a BEAD Bond Kit, which includes two different performance bond forms, model language for state broadband offices to insert into award agreements, and a sample letter template whereby a surety company can provide state broadband offices with initial information about an ISP or its construction contractor's bond capacity.

BEAD Performance Bond Forms

BEAD performance bonds were developed to address two separate situations to provide state broadband offices even greater flexibility in satisfying the security requirements under the program. One bond form addresses those situations when the ISP (the subgrantee) can qualify for bonding and furnishes the bond directly to the state broadband office (the grantee). In this instance, the ISP is the bonded principal, and the obligee (state broadband office) is the entity that is protected should the ISP fail to meet its obligations under the award agreement. The bond secures the completion of the construction of the system (excluding certain other obligations that may be in the award agreement).

The second bond form addresses those situations where the contractor to the ISP that is building out the broadband system is better suited to qualify for bonding. In this case, the contractor furnishes the bond for the joint benefit of the ISP and the state broadband office, both of which would be named as obligees under the bond. In this instance, the construction contractor is the bonded principal, and both obligees are financially protected should the contractor fail to meet its contractual obligations to the ISP. The bond secures the performance of the work set forth in the contract between the ISP and the contractor.

Final Considerations

As a hallmark of federal, state, and local public procurement, surety bonds are widely used and accepted forms of performance security. They provide a viable option for qualified companies that receive federal and state grant monies for developing broadband infrastructure. SFAA and NASBP believe that a workable bond requirement can be established that provides effective protection to the FCC for these programs, presents a reasonable risk to the sureties, and provides opportunities for increased participation by smaller ISPs. We would be happy to discuss the parameters of a workable surety bond requirement with you.

For the foregoing reasons, we respectfully request your consideration of a permanent programmatic waiver of letters of credit which would allow the use of performance bonds as an additional security option.

Submitted for your consideration,

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