

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

Connect America Fund	)	
Rural Broadband Experiments	)	WC DOC. No. 14-259
	)	
Rural Broadband Services Corporation, Inc.	)	
Request for Waiver of Requirement for	)	WC Doc. No. 10-90
Three Years of Audited Financial Statements	)	

**APPLICATION FOR REVIEW  
RURAL BROADBAND SERVICES CORPORATION, INC.**

David Cosson  
5151 Wisconsin Ave., N.W.  
Washington, D.C. 20016  
202 333 5275

Counsel for Rural Broadband Services  
Corporation, Inc.

February 18, 2015

## TABLE OF CONTENTS

<b>SUMMARY</b> .....	iv
<b>I INTRODUCTION AND BACKGROUND</b>	
A. The Commission’s Purpose In Adopting Rural Broadband Experiments Was To Obtain Information Regarding The Attraction Of New Entrants And The Promotion Of Service On Tribal Lands.....	2
B. The Bureau Provisionally Selected RBSC Despite Its Clear Pre-Selection Filings Showing That It Is A Start-Up Company Providing Service For Less Than A Year, Then Denied Its Waiver Of The Three Year Audited Financial Requirement Because It Could Not Provide Records That Were Impossible To Produce.....	3
<b>II QUESTIONS PRESENTED</b> .....	6
A. Whether The Order Is Contrary To Law And Commission Policy?	
B. Whether The Commission Should Grant RBSC’s Waiver Petition <i>Nunc Pro Tunc</i> ?	
<b>III ARGUMENT</b>	
A. The Order Rejecting All Waiver Petitions By Start-Up Entities Is Contrary To The Letter And Spirit Of Commission Orders And Beyond The Bureau’s Delegated Authority.....	6
1. The Bureau does not have delegated authority to adopt policies inconsistent with and contrary to those of the Commission.....	7
a. The Order is contrary to the Commission’s policy that the experiments should obtain information on the willingness and ability of a wide range of entities to provide Broadband to unserved areas and Tribal lands.....	7
b. The Order frustrates the Commission’s policy objective to learn from the experiments how best to support Broadband service on the historically un- and underserved Tribal lands.....	8
2. The Order does not acknowledge or explain the Bureau’s change in policy.....	9

B.	Refusal to Consider Waivers for Start-up Carriers for RBE Funding Is Not In the Public Interest.....	13
1.	Denial of RBSC waiver deprives the Commission of experimental information with respect to alternative means of providing service on the historically un- and underserved Tribal lands.	
2.	By moving down the scoring list the effect of the Order is ever decreasing efficiency in use of CAF Funds.	
C.	The Order is Arbitrary and Capricious. ....	14
<b>IV</b>	<b>CONCLUSION—RELIEF REQUESTED.....</b>	<b>16</b>

## SUMMARY

The Rural Broadband Services Corporation, Inc. applies for Commission review and reversal of the Order of the Deputy Chief, Wireline Competition Bureau denying RBSC, a start-up company, a waiver of the requirement for three years of audited financial statements as a condition of receipt of Rural Broadband Experiment funds. RBSC shows in this Application that the Order is contrary to law and Commission policy and requests that its waiver be granted and it be reinstated as a provisional selectee.

In the *Tech Transitions* and *Experiments Order* the Commission allocated \$100 million in Connect America Funds to Rural Broadband Experiments to obtain information, *inter alia*, about attraction of new entrants who would provide Broadband service to rural and Tribal lands. RBSC proposed to provide 100 Mbps service to business and anchor institutions and 25Mbps/5Mbps to residents on 2,829 census blocks on Tribal lands in northeastern Oklahoma at a support amount well below what the incumbent LEC would receive under the cost model.

RBSC's filings detailed the extensive relevant telecommunications experience of its management, the capabilities of its engineering design and the soundness of its financial plan. However RBSC also made clear that as a new company operating less than a year it was impossible to provide three years of audited financial statements. Upon being provisionally selected by the Bureau, RBSC filed the first round of additional required information except that it requested a waiver of the financial statements requirement. The waiver request was consistent with the statement posted on the Commission's website that in such situations applicants "should" request a waiver and that such waiver requests would be addressed on a case by case basis. The Wireline Competition Bureau asked for public comment on the request of RBSC and

several others, asking specifically whether the applicants had provided “sufficient alternative information to establish that they are financially capable.”

Instead of a case-by-case analysis of the financial capability of RBSC and the others, the Order of January 30, 2015 denied the request of RBSC and 14 others and removed them from further consideration without evaluation of any individual petitioner’s financial qualifications. The refusal to evaluate each waiver was asserted to be justified because such evaluation would be “resource intensive” and require a “protracted effort.”

The Order conflicts with the Administrative Procedure Act, the Communications Act and the Commission’s orders and policies. Without authority from the Commission, it establishes a policy that precludes start-up carriers from seeking the necessary waiver to participate in RBE funding, and, unless changed, in the competitive bidding under the CAF II program. In so doing it determines questions of law and policy not previously resolved by the Commission; is inconsistent with 47 C.F.R. 1.3 that allows waiver of any provision of the rules; constitutes a change in policy that is neither acknowledged or justified; and establishes precedent and policy contrary to the Public Interest.

The Commission’s stated purposes of the RBE program include obtaining information about the interest of alternative, non-incumbent providers to offer Broadband service, including information about the ability of other providers to offer service at substantially higher speeds than that required for ILEC recipients of model-based support. By adopting a “no-waivers for startups” policy the Order substantially reduces the amount of information that will be available to the Commission because it eliminates not only innovative start-up companies, but those whose

bids offered the most “bang for the buck” for use of universal service support. It is beyond the authority of the Bureau to make such changes to Commission policy.

Even if the Bureau had authority to adopt policies contradictory to important aspects of Commission policy, the Order constitutes a significant but un-acknowledged and unjustified change in Bureau policy. Rather than acknowledge a change from prior Bureau statements that waivers would be individually evaluated to a “no-waivers” and “no start-ups need apply” policy, the Order dismisses prior encouragement to request waivers and commitment to case-by-case evaluation as merely advising applicants of their rights. In so doing the Order obfuscates what is in fact a change in policy by misquoting the statement on the Commission’s website that applicants without three years of financial “should file for a waiver” restating it as “could seek a waiver” and ignored the further statement the applicant’s financial information would be evaluated on a “case-by-case basis”. It is well established that agencies can change their policies, *provided* they acknowledge that they are doing so and justify the new policy. The Order does neither.

There is no question that the Commission is required to be a “good steward” of the CAF funds or that recipients of funds for yet to be built facilities should demonstrate their financial capabilities and the feasibility of the proposal. The three years of audited financials requirement is one possible indication of financial strength, but it is an impossible requirement for a start-up company that may nevertheless be financially sound. So too, an entity producing such financials is subject to the well-known warning “past performance is no guarantee of future success.” This maxim is of particular relevance where the three years requirement is fulfilled by a parent company with no experience providing Broadband services, and even less where the parent does not intend to subsidize the new entrant.

What should be of very significant concern to the Commission is that the Order deprives it of substantial information regarding innovative and alternative means of providing service on Tribal lands. Applying a “no waiver” policy to the three years of financials requirement has limited usefulness. Where the limitations on the predictable accuracy of a screen are apparent, it is arbitrary and capricious to rely on the screen where there is credible evidence that waiver will likely produce results materially closer to the stated objectives of the Commission. Refusing to consider waivers means that the objectives of obtaining information of utility for the CAF II competitive bidding rules and immediate service to those unserved in rural areas and Tribal lands will not be realized.

For many years preceding this month’s release of the 2015 Broadband Report the Commission has taken note of the extreme lack of service available to residents of Tribal lands, and has adopted many provisions seeking to ameliorate this condition. Just last month Chairman Wheeler stated:

I have personally seen the lack of communications services and infrastructure across Indian Country, which has created a history of isolation that has limited economic and educational opportunities. That is why expanding high-speed broadband connections to all corners of the country is a top priority for the Commission. Nowhere could meeting this objective be more impactful than on Tribal lands.<sup>1</sup>

If not reversed, the Order will deprive the Commission of the very valuable information it would have obtained from implementation of RBSC’s proposal, both from the innovative technical and economic approaches it would take, but also from the very extensive involvement of the Tribal government in the construction and operation of the system.

The information from this operation would have not only significantly informed the Commission’s process, but would have provided a new model for Tribal governments

---

<sup>1</sup> Letter from Chairman Wheeler to Senator Maria Cantwell, Jan. 23, 2015.

throughout the country. Such an unfortunate outcome harms not only the relatively small number of potential subscribers to the proposed services, but all rural and Tribal lands which could benefit in the future competitive bidding from the innovations proposed by new companies. The waivers before the Bureau represented only a small fraction of total high cost support funds. The Bureau should have recognized that skewing the balance too far towards financial certainty conflicts with the Commission policy to use a few million dollars of the CAF “reserve funds” to conduct experiments from which it may learn how to better allocate the billions of dollars that will eventually be allocated.

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

Connect America Fund	)	
Rural Broadband Experiments	)	WC DOC. No. 14-259
	)	
Rural Broadband Services Corporation, Inc.	)	
Request for Waiver of Requirement for	)	WC Doc. No. 10-90
Three Years of Audited Financial Statements	)	

**APPLICATION FOR REVIEW  
RURAL BROADBAND SERVICES CORPORATION, INC.**

To: The Commission

The Rural Broadband Services Corporation, Inc. (“RBSC”), pursuant to Section 1.115 of the Commission’s Rules, respectfully requests the Commission to review the Order of the Deputy Chief, Wireline Competition Bureau, released January 30, 2015, DA 15-139 (“Order”). Without justification in law or Commission policy and contrary to the Public Interest the Order denied, without individual consideration, the petitions of RBSC and fourteen other petitioners for waiver of the requirement adopted in the *Rural Broadband Experiments Order* (“*Experiments Order*”) that provisionally selected bidders provide audited financial statements for the most recent three years. RBSC requests that the Commission vacate the Order, grant its petition and restore it to consideration for RBE funding. In support of this request the following is shown:

## I INTRODUCTION AND BACKGROUND

### A. The Commission's Purpose In Adopting Rural Broadband Experiments Was To Obtain Information Regarding The Attraction Of New Entrants And The Promotion Of Service On Tribal Lands.

In the *Transformation Order* the Commission created a new universal service support mechanism, the Connect America Fund (“CAF”), to which Price Cap regulated incumbent local exchange carriers would initially have exclusive access.<sup>2</sup> In Phase II of the CAF, a price cap carrier will receive support on a study area basis as determined by a cost model, but only if it commits to provide the supported services and broadband Internet access throughout the study area.<sup>3</sup> If the price cap carrier declines to make the study area wide commitment, the model based support will be awarded by competitive bidding.<sup>4</sup>

In the *Tech Transitions Order*<sup>5</sup> the Commission, in order to better understand how to design the competitive bidding process for CAF Phase II, adopted The Rural Broadband Experiment (“RBE”).<sup>6</sup> Wanting to determine the extent of interest among providers, the Commission encouraged proposals “from a wide range of entities, including... Tribal governments... competitive local exchange carriers... and others.”<sup>7</sup>

In the *Rural Broadband Experiments Order*<sup>8</sup> the Commission adopted a budget and a process for selecting winning applications for CAF support. With the goal of encouraging “a greater number of entities to participate,” the Commission agreed to accept proposals at the

---

<sup>2</sup> Connect America Fund, et al., *Report and Order*, 26 FCC Rcd 17663 (2011) (“*Transformation Order*”), *aff'd sub nom. In re FCC 11-161*, 753 F.3d 1615 (10<sup>th</sup> Cir. 2014).

<sup>3</sup> *Id.* at 18085, para. 1190.

<sup>4</sup> *Id.* at 17732, para. 179.

<sup>5</sup> Technology Transitions et al., *Order et al.*, 29 FCC Rcd 1433 (2014) (“*Tech Transitions Order*”).

<sup>6</sup> *Id.* at 1469, para. 102.

<sup>7</sup> *Id.* at 1470, 1474, paras. 104, 116.

<sup>8</sup> Connect America Fund, et al., *Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd. 8769 (2014) (“*Rural Broadband Experiments Order*”).

census block, rather than tract, level.<sup>9</sup> In order to encourage proposals to serve Tribal lands, the Commission adopted a 25 percent bid credit.<sup>10</sup> After winning bids are selected on the basis of their numerical scores, bidders are required to submit technical and financial information for review by the Bureau for verification of their qualifications. Among the information required is the most recent three consecutive years of audited financial statements.

On September 25, 2014 a document labeled “FAQs for Rural Broadband Experiments” was posted on the Commission’s website in the section devoted to Rural Broadband Experiments. Section V in this document provided:

**F. What should an entity do if it is newly-formed and does not have three years of audited financial statements available?**

If a winning bidder is unable to produce three consecutive years of financial statements, it should file for a waiver of this requirement after it has been named as a winning bidder. An entity should submit with its waiver petition evidence that demonstrates it is financially qualified. We then determine on a case-by-case basis whether it [sic] can assess the entity’s financial qualifications using the alternative evidence provided.<sup>11</sup>

B. The Bureau provisionally selected RBSC despite its clear pre-selection filings showing that it is a start-up company providing service for less than a year, then denied its request for waiver of the three year audited financial requirement because it could not provide records that were impossible to produce.

RBSC filed an Expression of Interest on March 7, 2014, timely filed its bid on November 5, 2014 and was provisionally selected by the Bureau on December 5, 2014.<sup>12</sup> RBSC submitted FCC Form 5620 on December 19, 2014 and attached all of the post-selection review information required at that time, except for the three years of audited financials. Prior to submitting the

---

<sup>9</sup> *Id.* at 8776, para. 14.

<sup>10</sup> *Id.* at 8784, para. 44.

<sup>11</sup> [http://fcc.gov/encyclopedia/rural\\_broadband\\_experiments](http://fcc.gov/encyclopedia/rural_broadband_experiments) (last visited Feb. 7, 2015) (“FAQ”). The posting has since been revised and the quoted question eliminated.

<sup>12</sup> Public Notice, *Wireline Competition Bureau Announces Entities Provisionally Selected for Rural Broadband Experiments; Sets Deadlines For Submission of Additional Information*, rel. Dec. 5, 2014, DA 14-1772, Attachment A. (“Selection Public Notice”)

Form 5620, , RBSC filed in WC Docket No. 10-90 a Request for Waiver of Requirement for Three Years of Audited Financial Statements on December 18, 2014. In that waiver request, RBSC pointed out that it had less than 6 months operational experience, that its books for the partial year of 2014 were not closed, much less audited, and given the short time of operation it would be impossible to provide three years of financial statements.<sup>13</sup> At least 14 other entities also filed waiver requests. The Bureau issued a request for public comments on December 23, 2014 specifically asking whether the waiver petitioners “have submitted sufficient alternative information to establish that they are financially capable....”<sup>14</sup> on January 6, 2015 several parties objected to granting any waivers of the audited financials requirement.<sup>15</sup> RBSC and the other waiver petitioners pointed out in replies that if the Commission had intended to categorically exclude start-up companies, it would not have included in the FAQ the statements that bidders unable to produce three years of financial statements should file a waiver of this

---

<sup>13</sup> RBSC committed to submitting an audited financial statement upon the closing of its first year of operation, and in succeeding years.

<sup>14</sup> Public Notice, Wireline Competition Bureau Announces Availability Of Additional Funding For Rural Broadband Experiments; Seeks Comment On Waiver Petitions Of Provisionally Selected Bidders, DA 14-1889, rel. Dec. 23, 2014 (“Waiver Comment Notice”). Prior to this notice, the Bureau announced that bidders not provisionally selected that wished to remain under consideration in the event of default by provisional selectees must file their financial and technical information by January 6, 2015. Public Notice, Wireline Competition Bureau Announces Deadline For Bidders Interested in Remaining Under Consideration For Rural Broadband Experiments Support To File Additional Information, rel. December 18, 2014, DA 14-1839.

<sup>15</sup> Among the objectors to any waivers were Oklahoma electric cooperatives that stand to benefit from denial of RBSC’s waiver as next-in-line entities. Lake Region Electric Cooperative, Ozarks Electric Cooperative Corporation (“Lake Region”), Northeast Rural Services, Statement in Response to Rural Broadband Experiment Waiver Requests, Jan.5, 2015. Subsequently the Bureau announced that Lake Region, *inter alia*, had submitted the required financial and technical information and was remaining under consideration as a next-in-line bidder. Public Notice, Wireline Competition Bureau Announces Entities Under Consideration As Next-In-Line Bidders For Rural Broadband Experiments Support, Feb. 3, 2015, DA 15-157.

requirement after it has been named a winning bidder and that the Commission would then evaluate the entity's qualifications on a case-by-case basis.

Nevertheless, on January 30, 2015 the Deputy Chief of the Wireline Competition Bureau issued the Order denying all of the requests for waiver of the three year financials requirement as a group and removed all of them, including RBSC, from "any further consideration for such support" without evaluating any individual petitioner's qualifications.<sup>16</sup> The Order asserts the public interest would not be served by grant of any of the waivers because of the "accelerated time frame," that grant would preclude consideration of other applicants that did submit the information, and that identification of next-in-line bidders would "inform key decisions that the Commission would be making regarding the design of the competitive bidding process that will occur in Phase II of the Connect America Fund."<sup>17</sup>

The Order asserts that the intention of the Commission to obtain "critical information regarding the interest and ability of alternative providers" must be balanced with the need to "ensure that the finite ... budget is distributed to entities that provide concrete evidence of their financial and technical capability...."<sup>18</sup> The determination not to engage in case-by-case evaluation of the unaudited or alternative financial information is alleged to be justified because such evaluation would require "resource-intensive effort" and a "protracted effort to determine whether the Petitioners have successfully demonstrated their financial capability."<sup>19</sup>

---

<sup>16</sup> Order at paras. 7, 15.

<sup>17</sup> Order at para. 5.

<sup>18</sup> *Id.* at para. 6.

<sup>19</sup> *Id.* at paras. 7,8.

## **II QUESTIONS PRESENTED**

A. Whether the Order denying provisional selectee RBSC waiver of a requirement it was impossible to meet conflicts with the Administrative Procedure Act, the Communications Act, Commission decisions, rules and policy because it: (a) in effect establishes a policy that precludes awarding RBE funding to start-up carriers; (b) establishes such policy in excess of any delegated authority and contrary to the rule permitting waivers; (c) determines a question of law and policy not previously resolved by the Commission; (d) constitutes a change in policy that it neither acknowledges nor justifies; and (e) constitutes a precedent and policy contrary to the public interest which the Commission should overturn or revise?

B. Whether, upon finding the Order unauthorized and contrary to law, precedent and policy, the Commission should grant RBSC's waiver petition *nunc pro tunc*, return its application for further consideration for support, and reject the "no waivers for startups" policy in this and future CAF II competitive bidding proceedings?

## **III ARGUMENT**

A. The Order Rejecting All Waiver Petitions By Start-Up Entities Is Contrary To The Letter And Spirit Of Commission Orders And Beyond The Bureau's Delegated Authority

The Order precludes start-up carriers from participating in RBE support. By denying waivers to RBSC and all the other bidders that have not been in operation for sufficient time to have three years of audited financial statements the Order establishes a new policy that bids from start-up carriers will never be accepted for RBE support regardless of whether they would meet the traditional standards for waiver. The Bureau can be expected to carry this policy forward into the CAF Phase II competitive bidding. For the reasons stated below this policy was adopted without authority and contrary to the very purposes of the Commission's orders and policies:

1. The Bureau does not have delegated authority to adopt policies inconsistent with and contrary to those of the Commission.

The Deputy Chief<sup>20</sup> of the Wireline Competition Bureau apparently relies for delegated authority to issue the Order on Section 0.291 of the Commission's rules and does not mention the specific delegation to perform *ministerial* acts regarding the RBE.<sup>21</sup> Section 0.291 denies the Bureau delegated authority to act on requests which "present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines."<sup>22</sup>

- a. The Order is contrary to the Commission's policy that the experiments should obtain information on the willingness and ability of a wide range of entities to provide Broadband to unserved areas and Tribal lands.

The policy announced in the relevant Commission orders is that a purpose of the experiments is to determine the interest in providing advanced broadband services by "a wide range of entities,"<sup>23</sup> "to understand what providers would be willing to offer what type of service in price cap areas....,"<sup>24</sup> "to address the extent of interest among non-incumbent services providers,"<sup>25</sup> "to provide critical information regarding which and what types of parties are

---

<sup>20</sup> Order, para. 14. The delegation of authority to the Chief, Wireline Competition Bureau in Section 0.291 does not provide express authority to subdelegate such authority. RBSC reserves the right to assert that Section 0.291 does not delegate authority to subordinate officials of the Bureau.

<sup>21</sup> 47 C.F.R. 0.291. That section, in turn, refers to Section 0.91 which includes as a function of the Bureau to act on requests for waiver of rules. The Order does not mention that the express delegation to the Bureau in this proceeding is "to take all necessary *ministerial* actions to implement this Phase II experiment, such as modifying filing deadlines as necessary." *Tech Transitions Order*, 29 FCC Rcd 1470, n. 176 (emphasis added). Determining that waiver applications from start-up carriers will not be considered and that they are therefore categorically excluded from RBE support is not a ministerial act.

<sup>22</sup> 47 C.F.R. 0.291(a)(2).

<sup>23</sup> *Tech Transitions Order*, 29 FCC Rcd at 1470, para. 104.

<sup>24</sup> *Id.* at 1465, para. 92.

<sup>25</sup> *Id.* para. 94

willing to build networks....”<sup>26</sup> The Commission decided to accept proposals at the census block, rather than tract level in order to “encourage a greater number of entities to participate.”<sup>27</sup> No intent to exclude start-up carriers was stated other than the requirement for post-selection submission of the three years audited financial statements, and no statement was made that waivers would not be considered.

It is, of course, unquestionable that the Commission should take reasonable measures to ensure the financial ability of winning bidders to construct and operate the systems they propose. Audited financials may be relevant to that goal, but are not the only means, and do not allow the Commission flexibility to obtain both information as to which non-incumbent carriers are willing and able to provide service. The Order however adopts a “no-waivers to startups” policy that the Commission did not intend and thereby denied the Commission the flexibility to learn about the range of alternative carriers willing to deploy advanced broadband in unserved areas, including Tribal lands. The Commission has not delegated to the Bureau Chief, or her Deputy, the authority to make such a policy and it is, therefore, invalid.

- b. The Order frustrates the Commission’s policy objective to learn from the experiments how best to support Broadband service on the historically un- and underserved Tribal lands.

The Commission also repeatedly stated that a purpose of the experiment was to obtain information about what entities and by what means Broadband service could be deployed on Tribal lands.<sup>28</sup> The RBSC bid was to serve exclusively census blocks located on Tribal lands.

---

<sup>26</sup> *Experiments Order*, 29 FCC Rcd at 8771, para. 6

<sup>27</sup> *Id.*, 29 FCC Rcd at 8776, para. 14.

<sup>28</sup> *See: Transformation Order*, 26 FCC Rcd at 17820, para. 482 (“As we have previously observed, various characteristics of Tribal lands may increase the cost of entry and reduce the profitability of providing service, including:“(1) The lack of basic infrastructure in many tribal communities; (2) a high concentration of low-income individuals with few business subscribers; (3) cultural and language barriers where carriers serving a tribal community may lack familiarity with the Native language and customs of that community; (4) the process of obtaining access to rights-of-way on tribal lands where

By adopting the no waivers for start ups policy the Order is inconsistent with Commission policy that the experiments should inform it about who and how Tribal lands can best be served with broadband, and for this additional reason exceeds the Bureau's delegated authority.

2. The Order does not acknowledge or explain the Bureau's change in policy.

It is well settled that administrative agencies may change their policies, provided that when doing so they acknowledge that they have changed policy and provide a reasoned explanation for the change.<sup>29</sup> Prior to release of the Order, the Bureau's public statements explicitly contemplated that it would consider waiver of the audited financials requirement on a case-by-case basis. Had the Bureau's prior policy been "no waivers" the Frequently Asked Questions posted on the Commission's website logically would have said "If a winning bidder is unable to produce three consecutive years of financial statements, no waiver request will be considered, it is disqualified and should notify the Commission that it will not pursue the award." Instead, the FAQ stated such bidders "should file for a waiver" and "We then determine on a case-by-case basis whether it [sic] can assess the entity's financial qualifications...."<sup>30</sup>

---

tribal authorities control such access; and (5) jurisdictional issues that may arise where there are questions concerning whether a state may assert jurisdiction over the provision of telecommunications services on tribal lands.") citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12,208, 12,226, para. 32 (2000); *Tech Transitions Order*, 29 FCC Rcd at 1464 ("it is critical that we take steps to ensure that all Americans benefit from the technology transitions, and that we gain data on the impact of technology transitions in rural areas, including Tribal lands,..."); *Experiments Order*, 29 FCC Rcd at 8781 ("Recognizing unique challenges in serving Tribal lands, we provide a bidding credit for entities that propose projects that will serve only Tribal census blocks, which will have the effect of making such projects more cost-effective relative to proposals from other entities.")

<sup>29</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1810-11 (2009) ("the requirement that an agency provide reasoned explanation for its action [will] ordinarily demand that it display awareness that it is changing position.")

<sup>30</sup> FAQ at Sec. V F. The posted document bears no indication of origin or authorship, is not dated (other than the link on the FCC encyclopedia stating Sep. 25, 2014) or page numbered. The nature and content implies it was produced by the Wireline Competition Bureau.

But beyond its public statements consistent with a policy that would consider waivers, it would have been fundamentally illogical for the Bureau to provisionally select RBSC and 14 others, and provide detailed instructions on the timing and content of the required supplemental information with full knowledge that as start-ups the three years of financial statements were not possible.<sup>31</sup> The fact that the Selection Public Notice removed some bidders from further consideration demonstrates that it considered whether there were facially non-compliant applicants, while leaving the start-up bidders to incur further expense to continue participation

That policy had apparently not changed by December 23<sup>rd</sup> when the Bureau issued a request for comments on the waiver petitions of RBSC and others. It specifically asked for comment in particular on whether “they have submitted sufficient alternative information to establish they are financially capable....”<sup>32</sup> If the policy was “no waivers” there would have been no logical reason to ask for comments on whether individual bidders had shown financial capability.<sup>33</sup>

By January 30, 2015 the Bureau changed its mind and concluded that no waivers would be considered. The Order, however, never explicitly states that it has changed its policy, and even attempts to deny that it had previously expected waivers from bidders unable to provide the three years of financial statements. In response to a Reply Comment, the Order states incorrectly that the statement in the FAQ was that parties “*could*” seek waivers was merely intended to inform parties of their rights. The FAQ however not only stated that such a party “*should*” file for waiver after it has been named a winning bidder, but that there would then be a case-by-case

---

<sup>31</sup> Selection Public Notice, *supra* n.11.

<sup>32</sup> Waiver Comment Notice, *supra* n. 12.

<sup>33</sup> As it turned out the filed opposition comments all argued that no waivers should be considered.

determination as to whether the party's financial qualifications can be assessed.<sup>34</sup> The differences between "could" and "should" are significant in this context and when added to the statement on case-by-case determinations there is no doubt that a major change in policy occurred. The attempt to disclaim such change demonstrates that it should be vacated by the Commission. However, even if the Commission proceeds to determine whether the unacknowledged change in policy is justified it will find that the proffered justifications are inconsistent with the Commission's announced public interest goals. Essentially the Order determines not to consider individual waivers on their merits because doing so would require the Bureau to expend time and resources and delay identification of next-in-line winners.<sup>35</sup> The Order recognizes that the Commission intended the experiments to provide information "regarding the interest and ability of alternative providers to build networks...." But then the Bureau takes upon itself the duty to "balance" the Commission's objective to learn about alternatives with "our duty as stewards of public funding" to determine that *no entity* that has not been operating for well over three years should even be considered to receive RBE funding.<sup>36</sup>

RBSC recognizes, of course, that the Commission has a duty as steward of the CAF and that examination of individual waivers requires time and resources. RBSC does argue, however, that it is up to the Commission, not the Bureau, to balance the interests, and that the time to do that balancing was no later than the issuance of the *Experiments Order*, or at the very latest the Bureau notices describing the filing procedures.

Apart from the "who and when" questions is the point that a material degree of uncertainty is inherent in experiments; if not there would be no reason to do experiments. Even

---

<sup>34</sup> FAQ, *op cit.* n. 27.

<sup>35</sup> Order at para. 5. (emphasis added)

<sup>36</sup> *Id.* at para. 6.

if the requirement for three years audited financials is determined to be “concrete evidence” of financial capability for the final competitive bidding rules, in the context of an “experiment” the Order’s conclusion necessarily means the Commission will learn a lot less from the experiment than what it wanted. Nothing is learned from “experiments” that have no chance of failure. The waivers before the Bureau represented only a small fraction of total high cost support funds. The Bureau should have recognized that skewing the balance too far towards financial certainty conflicts with the Commission policy to use a few million dollars of the CAF “reserve funds” to conduct experiments from which it may learn how to better allocate the billions of dollars that will eventually be allocated and how best to bring service to previously neglected and unserved Tribal lands.

There is, in any event, nothing magic about the ability of three years of audited financial reports to provide “concrete” evidence of the ability of bidders to fulfill their commitment. Were that the case the world would never have heard of Alexander Graham Bell, Thomas Edison, Steve Jobs or Bill Gates. But the Order concludes the Bureau shouldn’t take the time or make the effort to look at the business plans and the resources available to the bidders, apparently believing that past financial history is “concrete” evidence that a new undertaking, not necessarily related to, or supported by, the business that generated the finances, will be successful.<sup>37</sup>

---

<sup>37</sup> Following denial of the waivers of RBSC and the others, the Bureau named “next-in-line” bidders including Lake Region Electric Cooperative that was among the parties objecting to grant of any waivers. Public Notice, Wireline Competition Bureau Announces Entities Under Consideration as Next-In-Line Bidders for Rural Broadband Experiments Support, rel. Feb. 3, 2015, DA 15-57, Attach. A. As RBSC pointed out in its Reply Comments, while Lake Region’s electric operation can provide three years of financials, its broadband venture is only a year old. Thus the financial statements of the parent will tell the Bureau very little about whether the Broadband business plan is likely to be successful, except for the parent’s ability to subsidize its losses. The President of Lake Region, however, has pledged to the members that the electric

B. Refusal to Consider Waivers for Start-up Carriers from RBE Funding Is Not In the Public Interest

1. Denial of RBSC waiver deprives the Commission of experimental information with respect to alternative means of providing service on Tribal lands.

As described in Section A 1. b. above, the Commission has consistently repeated its concern that Tribal lands are unserved or underserved. The decision to exclude RBSC because it is a startup, in addition to being inconsistent with Commission's purpose in creating the experiments, is contrary to the Public Interest. The most recent Broadband Report states that 63 percent of the population of Tribal lands nationwide and in Oklahoma are without access to Fixed 25Mbps/3Mbps Broadband.<sup>38</sup> For the rural areas of the counties which RBSC proposes to serve, two are 100% unserved, the others are 89%, 79% and 77% unserved.<sup>39</sup>

The Order, in effect, rejects for reasons unrelated to its merits, a comprehensive technically innovative and financially sound proposal developed by experienced telecommunications professionals to serve exclusively Tribal land census blocks. The Form 5610 and 5620 submissions of RBSC described plans for Gigabit fiber rings to be deployed in tandem with wireless mesh and fiber transport. RBSC has developed a "Rapid Deployment Technology" capable of bringing service to the area much earlier than conventional practice. The RBSC

---

operations will not subsidize the Broadband service. RBSC Reply to Comments, Dec. 18, 2014, p. 3.

<sup>38</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act.* GN Doc. No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry of Immediate Action to Accelerate Deployment, rel. Feb. 4, 2015, FCC 15-10, Table 5, Appendix F. ("2015 Broadband Report"). Although the Broadband Report was issued a few days after the Order at issue here, the Bureau would have been aware of its contents and, in any event, the low levels of Broadband availability in Tribal areas have been of known for some time. *See, e.g., Id.* At Table 13.

<sup>39</sup> *Id.* at Appendix E, pp. 50-52.

proposal would, if awarded RBE funding, provide the Commission with invaluable information regarding not only the technical and economic aspects of providing Broadband to Tribal lands, but innovative approaches to deep involvement of the Tribal government.

2. By moving down the scoring list, the effect of the Order is ever decreasing efficiency in the use of CAF funds.

RBSC was provisionally selected because its proposal was to provide more service and require less support. The 10 year model support would have paid the ILEC almost \$60 million. The RBSC proposal will provide a much higher grade of service than required for model support for approximately \$17.5 million, while providing high speed broadband service to over 200,000 people living on Tribal lands. By moving to next-in-line applicants the Bureau will be awarding support in a less efficient manner.

#### C. The Order is Arbitrary and Capricious

Agency actions are arbitrary and capricious under 5 U.S.C. § 706(2)(A) when they do not provide a reasonable explanation that connects the “facts found” and the “choice made.”<sup>40</sup> In these related proceedings the Commission has found that rural areas in general, and Tribal lands in particular, are more costly to serve and exhibit significantly lower levels of availability of Broadband, particularly at the current 25Mbps/3Mbps level, than urban and non-Tribal lands. The Commission has also found that it lacks information on what alternative business models and technologies could best be involved in its planned competitive bidding for CAF II funds and that its rules for such bidding will be better designed after being informed by the results of offering a limited amount of funding for experiments. The Order, however, by refusing to consider proposals from start-ups necessarily precludes the Commission from obtaining information that may well be the

---

<sup>40</sup> *Motor Vehicle Manufacturers Association of the United States, Inc., v. State Farm Mutual Automobile Insurance Co., et al.*, 463 U.S. 29, 43 (1983); *Kristin Brooks Hope Center v. FCC*, 626 F.3d 586, 591 (D.C. Cir. 2010).

most innovative. This refusal harms not only the relatively small number of potential subscribers to the proposed services, but all rural and Tribal lands which could benefit in the future competitive bidding from the innovations proposed by new companies.

The apparent controlling fact found in the Order is that consideration of waiver requests on a case-by-case basis would require more resources than the Bureau wanted to devote to the process. The choice made to avoid expending virtually any resources by eliminating startups may be consistent with that fact, but elevation of a goal of avoiding extra work for the Bureau over the universal service goals expressed in Sections 1, 254 and 706 of the Act and the Commission's implementing decisions is arbitrary and capricious.

A further illustration of the arbitrary and capricious character of the Order is fact that while three years of audited financials may be some measure of the probability of a firm's ability to build and operate a Broadband system, the Commission has neither found such a showing definitive, nor that those without such financials are unlikely to succeed. This is especially the case where the Bureau has now selected as next-in-line entities whose parent companies have years of financial results *in a different business using different technology*, but rejecting applicants with many years of proven ability in the relevant business and technology and substantial vendor financing. Where the limitations on a the predictable accuracy of a screen are apparent, it is arbitrary and capricious to rely on the screen where there is credible evidence that evaluation of individual waiver requests will likely produce results materially closer to the stated objectives of the Commission.

The Order also disconnects facts found from choices made by eliminating RBSC and other applicants with the highest cost effective scores. One goal of the experiments is to find out whether alternative providers are able to offer service at support funding levels below the cost-model. By eliminating RBSC, which proposed to offer service substantially better than that required by the model at a much reduced cost, without considering its waiver individually, the Order is arbitrary and

capricious.<sup>41</sup> If the Commission does not learn what start-up companies with the most cost effective proposals can actually accomplish, and the “no waivers for startups” policy carries forward into the broader CAF II competitive bidding process, the result will be that less service of lower quality is delivered at higher cost to the CAF. The Commission’s rules contemplate that: “Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”<sup>42</sup> Waiver may be required where the purpose of the rules would otherwise not be accomplished: that is the case here; the requirement should have been waived.<sup>43</sup>

#### **IV CONCLUSION---RELIEF REQUESTED**

For the reasons set forth above, RBSC respectfully requests that the Order should be reversed, that the Commission order its waiver granted, that RBSC be reinstated as a provisional selectee, *nunc pro tunc*, and that the Bureau’s “no waivers for startups” policy be rejected for both RBE and CAF II competitive bidding purposes .

Respectfully submitted

Rural Broadband Services Corporation, Inc.

David Cosson  
Its Attorney

5151 Wisconsin Ave., N.W.  
Washington, D.C. 20016  
202 333 5275

February 18, 2015

---

<sup>41</sup> As RBSC pointed out in its separate Request for Waiver of Letter of Credit Requirement, filed Feb. 3, 2015: “The RBSC Project 1 carries a 10-year model support amount of \$59,780,662. The RBSC bid to build out Project 1 is for support of \$17,500,648, a savings of \$42,280,014.”

<sup>42</sup> 47 C.F.R. 1.3

<sup>43</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

CERTIFICATE OF SERVICE

I, David Cosson, certify that on February 18, 2015 copies of the foregoing Application for Review of the Rural Broadband Services Corporation in WC Docket 10-90 were served on the following parties:

\_\_\_\_\_  
/s/ David Cosson

Jonathan Banks\*  
B. Lynn Follansbee  
US Telecom Association  
607 14<sup>th</sup> Street, N.W. Suite 400  
Washington, D.C. 2005

Michael R. Romano\*  
Joshua Seidemann  
NTCA – The Rural Broadband Association  
4121 Wilson Blvd., 10<sup>th</sup> Floor  
Arlington, VA 22203

Hamid Vahdatipour  
Lake Region Electric Cooperative, Inc.  
PO Box 127  
Hulbert, OK 74441

Alyssa Clemens-Roberts  
Ozarks Electric Cooperative Corp., Inc.  
PO Box 848  
Fayetteville, AR 72702

Shelia Allgood  
Northeast Rural Services  
PO Box 399  
Vinita, OK 74301

Thomas Cohen\*  
Kelley Drye & Warren LLP  
3050 K St., N.W.  
Washington, D.C. 20007

Matthew M. Polka  
American Cable Association  
One Parkway Center, Suite 212  
Pittsburgh, PA 15220

Ross J. Lieberman  
American Cable Association  
2415 39<sup>th</sup> Pl., N.W.  
Washington, D.C. 20007

Robert L. Hance  
Midwest Energy Cooperative  
901 East State Street  
PO Box 127  
Cassopolis, MI 49031

K.C. Halm\*  
Davis Wright Tremaine LLP  
1919 Pennsylvania Ave., N.W., Suite 800  
Washington, D.C. 20006  
Counsel to Computer 5, Inc. d/b/a LocalTel Communications

Keven Lippert  
ViaSat, Inc.  
6155 El Camino Real  
Carlsbad, CA 92009

John P. Janka\*  
Jarrett s. Taubman  
Latham & Watkins LLP  
555 Eleventh St., N.W. Suite 1000  
Washington, D.C. 20004

Andrea W. Welter\*  
Burns Figa & Will, P.C.  
6400 S. Fiddler's Green, Suite 1000  
Greenwood Village, CO 80111  
Counsel to Skybeam LLC

W. Scott McCollough\*  
Matthew A. Henry  
McCollough/Henry PC  
1250 S. Capital of Texas Hwy Bldg 2-235  
West Lake Hill, TX 78746

Stephen E. Coran\*  
Laura M. Berman  
Lerman Senter PLLC  
2000 K Stree, N.W. Suite 6000  
Washington, D.C. 20006  
Counsel for Agile Network Builders, LLC et al.

Brett Kilbourne  
Utilities Telecommunications Council  
1129 20<sup>th</sup> St., N.W., Suite 350  
Washington, D.C. 20036

Michael D. Donnell  
San Joaquin Broadband  
5195 Pinyon Jay Rd.  
Parker, CO 80134

Anthony Stroupe  
Tower Communciations LLC  
1991 Marsh Oak Lane  
Seabrook Island, S.C. 29455

Tamara Davis Brown  
Last Mile Broadband LLC  
P O Box 1292  
Clinton, MD 20735

Jennifer I Richter\*  
Akin Gump Strauss Hauer & Feld LLP  
1333 New Hampshire Ave., N.W.  
Washington, D.C. 20036  
Counsel to Mercury Wireless, Inc.

Suma Nallapatl  
Colorado Governor's Office of Information Technology  
601 East 18<sup>th</sup> Ave., Suite 250  
Denver, CO 80203

Ralph S. Adams  
Chaffee County Telecom, LLC  
170 East Golden Ave.  
Crestone, CO 81131

Bob Nichols

Declaration Networks Group, Inc.  
1950 Old Gallows Rd., Suite 201  
Vienna, VA 22182

Yahel Ben-David  
De Novo Group  
521 Bonnie Dr.  
El Cerrito, CA 94530

AirNorth Communications, Inc.  
2732 Orchard Beach Rd.  
Cheboygan, MI 49721

Jawaid Bazyar  
Brainstorm Internet, Inc.  
2347 Curtis St., Denver CO 80205

Fareed Sagair  
Crystal Broadband Networks  
5860 Main St.  
Clay City, KY 40312

---

\* service by e-mail

