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May 21, 2015

Via ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Room TW-A325
Washington, DC 20554

Re: Rural Broadband Services Corporation, Inc. Application for Review,
Rural Broadband Experiments, WC Docs. 14-259, 10-90.
Written *Ex Parte* Communication

Dear Ms. Dortch:

Rural Broadband Services Corporation, Inc.’s (“RBSC”) Application for Review (“AFR”) filed February 18, 2015 asked the Commission to reverse the Order of the Deputy Chief of the Wireline Competition Bureau denying RBSC a waiver of the requirement in the Rural Broadband Experiment program that it provide three years of audited financial statements. The requirement posed an impossible barrier to participation for carriers such as RBSC with less than three years operating experience. RBSC argued, *inter alia*, that the Bureau’s determination that it would not consider individual waivers on their merits because of time and resource considerations constituted an unacknowledged and unjustified change of policy, contrary to settled administrative law.

On May 8, 2015, after the close of the comment period on the AFR, the US Court of Appeals for the District of Columbia Circuit, in *CBS Corporation v. FCC*, ___F.3d ___, No. 14-1242, (2015), vacated the Commission’s order that merger parties submit proprietary documents for review by other parties on an expedited basis. The Court found the Media Bureau’s decision to allow access to certain documents five days after the Bureau had rejected an objection was a substantial change in policy that was neither acknowledged nor justified:

For starters, although the Commission concedes that the Bureau has changed *the governing protective orders*, the Bureau acknowledged nowhere in its Order that the new *rule* departs from longstanding practice. The Commission insists that by adding the five-day rule to the protective order, the Bureau did acknowledge that it was breaking from precedent. That is, the Bureau acknowledged the departure—by departing. This, of course, is completely insufficient. An agency must “provide a reasoned *analysis* indicating that prior policies are

being deliberately changed.” *Ramaprakash*, 346 F.3d at 1124 (emphasis added) (internal quotation marks omitted)¹

The RBSC AFR explained that the Order not only changed, without authority, the Commission’s long standing policy established in its rules that any rule may be waived, but also changed the Bureau’s stated policy that carriers without three year’s operating experience *should* file a waiver request which would be considered on a case by case basis and asked for other parties comments on how to evaluate individual financials. Like the Media Bureau Order vacated in *CBS*, the Order did not acknowledge a change in policy other than by stating the new policy. The refusal to evaluate the financial information of any of the 15 applicants rather than consider the waivers on a case by case basis was therefore a change of the policy that required both acknowledgement and justification.

As RBSC stated in its April 17, 2015 *ex parte* there is nothing in the Bureau’s Order rejecting the 15 waivers that would indicate that the Bureau actually evaluated the financial information provided by RBSC. To the contrary, a fair reading of the Order leads only to the conclusion that the Bureau did not intend to consider the individual merits of RBSC’s or any other carrier’s financial showings. Paragraph 5 states: “...strict enforcement of the deadlines and filing requirements established by the Commission is appropriate given the accelerated time frame for rural broadband experiments.” This theme is expanded in Paragraph 7:

Given the accelerated timing of the rural broadband experiments, we are not convinced that the public interest would be served by granting the waiver requests. Doing so would provide less assurance regarding the true financial picture of the Petitioners and would likely require a more resource-intensive effort by the Bureau to assess the alternative financial materials of those entities seeking a waiver. This would divert the Bureau from fulfilling the Commission’s overarching objective of moving swiftly to implement Phase II. (footnote omitted)

These words are consistent only with the conclusion that, contrary to its prior commitment to case by case analysis, the Bureau did not, in fact, conduct such analysis of any of the waiver petitioner’s alternative financial materials, or, if it did such analysis, has provided no statements of its reasons for finding them inadequate.

Finally, with respect to the statement that consideration of the alternative financial materials would slow the implementation of Phase II, RBSC notes that the Court in *CBS* was also faced with an alleged need for expedition as justification for a policy but found it wanting. The assertion that the merger review process would be bogged down by objections to release of information was not compelling because: “...the objection process represented the only administrative avenue open to petitioners to protect their right to meaningful pre-disclosure review.”² Similarly, requesting a waiver of the three year financials requirements, which the Bureau initially encouraged, was the only

¹ *CBS v. FCC*, slip op. at 19. In *Ramaprakash v. Federal Aviation Administration*, 346 F.3d 1121, 1130 the Court noted its earlier statement that “the core concern underlying the prohibition of arbitrary or capricious agency action” is that agency “ad hocery” is impermissible.

² *Id.*, slip op. at 21.

administrative avenue open to RBE petitioners.

Please address any questions on this matter to me.

Sincerely yours

David Cosson

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cc:

Senator Inhofe

Congressman Cole

Congressman Bridenstine

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