

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

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
Rural Broadband Experiments)	WC Docket No. 14-259
)	

To: Chief, Wireline Competition Bureau

PETITION FOR RECONSIDERATION

Halstad Telephone Company (“Halstad”), by its attorneys and pursuant to Sections 1.106 and 1.429 of the Bureau’s Rules,¹ hereby petitions the Wireline Competition Bureau (“Bureau”) for reconsideration of the June 15, 2015 *Order*² by the Bureau’s Deputy Chief, affirmatively removing Halstad from further consideration as a provisionally winning bidder under its Rural Broadband Experiments (“RBE”) program. For the reasons set forth below, Halstad respectfully submits that it should be reinstated as a provisionally winning bidder. Specifically, Halstad has since obtained a Letter of Credit (“LOC”) from a bank that meets all of the applicable criteria, and respectfully requests the Bureau to accept it *nunc pro tunc* for the purposes of its RBE application. Even without this letter, the Bureau’s decision to remove Halstad from consideration was arbitrary and capricious because the amount of support to be awarded to Halstad is relatively small; and the Bureau did not adequately explain why it would not consider Halstad’s request to accept as sufficient the letter from its local bank, in light of the relevant circumstances. Halstad is contemporaneously filing a Petition for Waiver regarding the LOC filing deadline and asking the

¹ 47 CFR §1.106 and §1.429.

² *In the Matter of Connect America Fund, Rural Broadband Experiments*, WC Docket No. 10-90, 14-259, DA 15-698, released June 15, 2015 (the *Order*).

Bureau to accept its new LOC. None of the Commission's processes will be prejudiced by a grant of this Petition.

Background

On December 5, 2014, the Bureau announced that Halstad was provisionally selected for \$303,370 in funding through the RBE program. In support of its provisional selection, Halstad timely submitted the information required by the Bureau, including a letter of commitment for an LOC on January 26, 2015. Included with Halstad's January 26, 2015 submission was a letter explaining Halstad's efforts to obtain an LOC from a top-100 bank, and informally requesting that the Bureau waive that particular requirement and accept the Letter of Credit it had obtained from its local bank, with which it has done business for more than one hundred years. Implicit in Halstad's presentation (although not precisely stated as such) was a request for waiver of the top-100 bank requirement.

On June 15, 2015, the Bureau issued the *Order* of which Halstad presently seeks reconsideration. In the *Order*, the Bureau removed Halstad from further consideration as a winning bidder in the Rural Broadband Experiments program for failing to submit a letter of commitment for an LOC from a top 100 bank.³ The Bureau did not address Halstad's informal request for waiver of the top-100 requirement.

Halstad Has Obtained An Acceptable Letter of Credit

The Bureau should reconsider Halstad's removal because the company has since addressed the LOC issue with an acceptable bank letter, and because allowing Halstad to continue as a provisionally selected bidder would prejudice neither the Commission's processes nor other RBE applicants, and is otherwise in the public interest.

³ *Order* at ¶9.

On July 8, 2015, Halstad obtained a letter of commitment for an Irrevocable Standby Letter of Credit from CoBank, ABC (“CoBank”), attached hereto as Attachment A, to support its winning bid in the Rural Broadband Experiments program. The Bureau expressly recognized CoBank as an acceptable institution from which Rural Broadband Experiments participants could obtain an LOC.⁴

In its Public Notice reminding provisionally winning bidders about the LOC deadline, the Bureau “expressly contemplated that participants in the experiments might meet the LOC requirement in a variety of ways,” and affirmatively stated that “selected entities would have flexibility in how they structure these arrangements and might choose to obtain multiple LOCs over the support term.”⁵ In particular, the Bureau also expressly noted that “[t]here is no Bureau requirement that the same bank issue the commitment letter and the ultimate LOC.” As such, accepting the CoBank letter *nunc pro tunc* would simply allow Halstad the flexibility the Bureau envisioned. Halstad respectfully requests the Bureau accept the attached letter *nunc pro tunc* and reinstate Halstad as a provisionally winning bidder.

Granting the Petition would not result in prejudice, either to the Commission’s processes or the other carriers. As outlined in Halstad’s project application, the company will be leveraging its existing network to provide service to the RBE locations covered in its application. Therefore, actual construction will be minimal and the Bureau’s stated policy objective of rapidly deploying funding to expand broadband service is accomplished, likely faster than most any other RBE

⁴ *In re Connect Am. Fund; Annual Reports & Certifications*, 29 FCC Rcd 8769 (F.C.C. July 14, 2014) at ¶60 (*Rural Broadband Experiments Order*).

⁵ *Wireline Competition Bureau Reminds Provisionally Selected Rural Broadband Experiments Bidders of Letter of Credit Requirements*, WC Docket No. 10-90, Public Notice (released Jan. 23, 2015).

project. Indeed, granting the instant Petition would effectively allow Halstad to make use of the cure period the Bureau has already put in place for funded RBE projects.⁶

Finally, the Bureau has already announced the offers of model-based support to the price cap carriers and, accordingly, no additional rural broadband experiment bids will be selected.⁷ Therefore, no prejudice would result to either price cap carriers or other RBE participants.

As noted above, Halstad has also submitted its new LOC under separate cover, along with a request for limited waiver of the deadline for filing the letter of commitment for an LOC, and requesting the Bureau accept the new LOC.

The Decision to Remove Halstad from Consideration was Arbitrary and Capricious

Even without the new LOC, the Bureau should reconsider Halstad's removal because its decision to do so was arbitrary and capricious. It is axiomatic of administrative law that an agency decision must be "based upon a consideration of the relevant factors."⁸ Further, an agency must adequately explain the basis for its decisions.⁹ In this case, the Bureau removed Halstad without considering the relevant factual circumstances of its award: Halstad's informal request for a waiver of the requirement, filed along with its original LOC; the comparatively small amount of funding awarded, which does not pose the same material risks against which the LOC requirement was designed; and the evidence in the record indicating the difficulty, if not impossibility, for a small rural telephone cooperative in North Dakota to obtain an LOC from a top-100 bank without having to agree to onerous conditions. In these circumstances, summarily

⁶ *Rural Broadband Experiments Order* at ¶60.

⁷ *Wireline Competition Bureau Announces Connect America Phase II Support Amounts Offered to Price Cap Carriers to Expand Rural Broadband*, WC Docket No. 10-90, Public Notice, DA 15-509, 30 FCC Rcd 3905 (Wireline Comp. Bur. rel. Apr. 29, 2015).

⁸ *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir. 1997) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (U.S. 1971)).

⁹ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29 (1983).

eliminating Halstad as a provisionally winning bidder does not meet the arbitrary and capricious standard, as the Bureau failed to give Halstad’s informal waiver request the “hard look” mandated by the U.S. Court of Appeals for the District of Columbia Circuit in *WAIT Radio v. FCC*.¹⁰

The Bureau should have considered the letter submitted along with Halstad’s original letter of commitment that explained why Halstad submitted a letter from a bank that was not a top-100 bank, and requested that the Bureau accept its letter nevertheless. In its discretion, the Bureau could have, and should have, treated the letter as a request for waiver of the top-100 requirement.¹¹ Halstad respectfully submits that grounds to grant such a waiver exist. The Petition for Waiver submitted contemporaneously with this Petition formally requests such a waiver as an alternative form of relief.

In the *Order* removing Halstad from consideration as a provisionally winning bidder, the Bureau indicated that it did not have the time to determine whether a bank that is not a top-100 bank would have its assets exhausted by drawing on the LOC. However, Halstad’s provisionally winning bid of \$303,760 is small compared to most of the other provisionally selected winning bidders, more than half of which were more than \$1 million, and indeed, such a scenario is highly unlikely. According to the terms of the Commission’s requirements for the LOC, the initial letter need only cover the first disbursement – in Halstad’s case, \$30,376 – and may be

¹⁰ 418 F. 2d 1153, 1159 (D.C. Cir. 1969).

¹¹ See, e.g., *In re Amendments to the Rules Governing PS Narrowband Operations et al.*, 30 FCC Rcd 3699, 3700 (F.C.C. 2015)(“Although styled as a request for extension of time, we treat the NRPC request as a request for waiver.”); *In re Allan Shivers Library, Woodville, Tex. et al.*, 29 FCC Rcd 10356, 10357 (F.C.C. 2014)(“Although some petitioners did not explicitly request a waiver of the FCC Form 471 application filing window deadline, we treat as requests for waiver all of the requests for review involving FCC Form 471 applications that were submitted after the relevant filing window deadline.”)

incrementally increased upon each additional disbursement.¹² These requirements effectively limit any issuing bank's exposure to a manageable sum.

Moreover, the Commission has not yet addressed an Emergency Petition for Limited Waiver of the top-100 bank requirement filed by NTCA-The Rural Broadband Association ("NTCA").¹³ In its request, NTCA points out the difficulty rural providers may have obtaining LOCs from top-100 banks. No party filed in opposition to NTCA's request. The Commission also sought comment on, but has not yet addressed, LOC requirements for Connect America Phase II funding.¹⁴ In that proceeding, NTCA again raised the issue of the top-100 bank requirement, as did the National Rural Electric Cooperative Association.¹⁵ Halstad's own experience, as indicated by the attached correspondence from Wells Fargo, supports these contentions – for example, according to the bank's representative, the Commission's 'next day' payment requirement "put a great deal of risk" on the bank and was "close to impossible" to meet.¹⁶

¹² *Wireline Competition Bureau Reminds Provisionally Selected Rural Broadband Experiments Bidders of Letter of Credit Requirements*, WC Docket No. 10-90, Public Notice (released Jan. 23, 2015).

¹³ *Emergency Petition of NTCA-The Rural Broadband Association for Limited Waiver of Rural Broadband Experiment Letter of Credit Requirement*, WC Docket Nos. 10-90, 14-58, and 14-259, filed February 3, 2015.

¹⁴ *Wireline Competition Bureau Seeks Comment More Generally on Letter of Credit Proposals for Connect America Phase II Competitive Bidding Process*, WC Dockets No. 10-90 and 14-259, Public Notice (Wireline Com. Bur. Released Feb. 27, 2015).

¹⁵ *Comments of the National Rural Electric Cooperative Association on Petitions for Waiver of Letter of Credit Financial Institution Eligibility and Other Requirements for Rural Broadband Experiments and the Connect America Phase II Competitive Bidding Process*, WC Docket Nos. 10-90 and 14-259, filed March 30, 2015 at pp. 3-4 (highlighting how the top-100 bank LOC requirement would undermine participation by many small businesses that are located in rural areas and that tend to work with lenders other than national or big regional banks).

¹⁶ Email from Brian T. O'Connell to Gregory Sjoström, dated January 16, 2015 (attached hereto as Attachment B).

Conclusion

For the foregoing reasons, Halstad respectfully requests that the Bureau reconsider its decision to remove Halstad from consideration as a provisionally selected RBE winner, and accept *nunc pro tunc* its LOC from CoBank, in satisfaction of that procedural requirement. A grant of Halstad's Petition would further the Bureau's goals in advancing broadband expansion without prejudice to either its processes or other carriers, and is accordingly in the public interest.

Respectfully submitted,

Halstad Telephone Company

By:  _____
Harold Mordkofsky
Benjamin H. Dickens, Jr.
Salvatore Taillefer, Jr.
Its Attorneys

Blooston, Mordkofsky, Dickens,
Duffy & Prendergast, LLP
2120 L Street, NW, Suite 300
Washington, DC 20037
Phone: (202) 659-0830

Dated: July 15, 2015

ATTACHMENT A

July 8, 2015

Attn: Mr. Tom Maroney
Halstad Telephone Company
345 Second Avenue West
Halstad, MN 56548-0055

Dear Mr. Maroney,

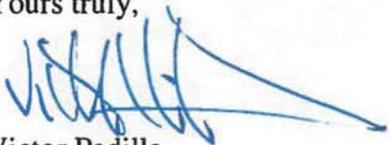
CoBank, ACB ("**CoBank**") is pleased to issue its commitment (the "**Commitment**") to provide Halstad Telephone Company (the "**Company**") with an Irrevocable Stand-by Letter of Credit in the amount of \$303,000.00 (the "**LOC**") to support the winning bids of the Company and for the benefit of the Universal Service Administrative Company ("**USAC**"). The LOC terms and conditions will be substantially in a form and substance consistent with those found in the Federal Communications Commission's Model Letter of Credit, a form of which is attached hereto as **Exhibit A**, and will include such other terms and conditions as required by CoBank.

Additionally, the issuance of the LOC is subject to and contingent upon the execution by CoBank and the Company of all documentation required by and in form and content acceptable to CoBank (the "**LOC Documents**"), the payment of any and all associated fees or costs, and such other requirements as deemed necessary by CoBank.

The LOC Documents will be provided under separate cover. The LOC will not be issued until the LOC Documents have been executed by all parties and all terms and conditions detailed in the LOC Documents have been satisfied as determined in CoBank's sole discretion. Nothing contained in this letter shall be construed as an agreement or a commitment on behalf of CoBank to provide additional letters of credit in the future.

If you have any questions, please contact me at (303)740-6468. We appreciate the opportunity to do business with you and look forward to serving your financial needs.

Yours truly,

A handwritten signature in blue ink, appearing to read "Victor Padilla", with a long horizontal flourish extending to the right.

Victor Padilla
Vice President

EXHIBIT A

Federal Communications Commission's Model Letter of Credit

[Subject to Issuing Bank Requirements]

No. _____

[Name and Address of Issuing Bank]

[Date of Issuance]
[AMOUNT]
[EXPIRATION DATE]

BENEFICIARY

[USAC]
[Address]

LETTER OF CREDIT PROVIDER

[Winning Bidder Name]
[Address]

Ladies and Gentlemen:

We hereby establish, at the request and for the account of [Winning Bidder], in your favor, as required under the [Report and Order, adopted on July 11, 2014 issued by the Federal Communications Commission ("FCC") in the matter of [Connect America Fund, WC Docket 10-90] (the "Order"), our Irrevocable Standby Letter of Credit No. _____, in the amount of [State amount of Letter of Credit in words and figures. NOTE: The amount of the Letter of Credit shall increase/additional letter(s) of credit shall be issued as additional funds are disbursed pursuant to the terms of the Order], expiring at the close of banking business at our office described in the following paragraph, on [the date which is ___ years from the date of issuance/ or the date which is one year from the date of issuance, provided the Issuing Bank includes an evergreen clause that provides for automatic renewal unless the Issuing Bank gives notice of non-renewal to USAC by a nationally recognized overnight delivery service, with a copy to the FCC, at least sixty days but not more than 90 days prior to the expiry thereof], or such earlier date as the Letter of Credit is terminated by [USAC] (the "Expiration Date"). Capitalized terms used herein but not defined herein shall have the meanings accorded such terms in the Order.

Funds under this Letter of Credit are available to you against your draft in the form attached hereto as Annex A, drawn on our office described below, and referring thereon to the number of this Letter of Credit, accompanied by your written and completed certificate signed by you substantially in the form of Annex B attached hereto. Such draft and certificates shall be dated the date of presentation or an earlier date, which presentation shall be made at our office located at [BANK ADDRESS] and shall be effected either by personal delivery or delivery by a nationally recognized overnight delivery service. We hereby commit and agree to accept such presentation at such office, and if such presentation of documents appears on its face to comply with the terms and conditions of this Letter of Credit, on or prior to the Expiration Date, we will honor the same not later than the first banking day after presentation thereof in accordance with your payment instructions. Payment under this Letter of Credit shall be made by [check/wire transfer of Federal Reserve Bank of New York funds] to the payee and for the account you designate, in accordance with the instructions set forth in a draft presented in connection with a draw under this Letter of Credit.

Partial drawings are not permitted under this Letter of Credit. This Letter of Credit is not transferable or assignable in whole or in part.

This Letter of Credit shall be canceled and terminated upon receipt by us of the [USAC's] certificate purportedly signed by two authorized representatives of [USAC] in the form attached as Annex C.

This Letter of Credit sets forth in full the undertaking of the Issuer, and such undertaking shall not in any way be modified, amended, amplified or limited by reference to any document, instrument or agreement referred to herein, except only the certificates and the drafts referred to herein and the ISP (as defined below); and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement except for such certificates and such drafts and the ISP.

This Letter of Credit shall be subject to, governed by, and construed in accordance with, the International Standby Practices 1998, International Chamber of Commerce Publication No. 590 (the "ISP"), which is incorporated into the text of this Letter of Credit by this reference, and, to the extent not inconsistent therewith, the laws of the State of New York, including the Uniform Commercial Code as in effect in the State of New York. Communications with respect to this Letter of Credit shall be addressed to us at our address set forth below, specifically referring to the number of this Letter of Credit.

[NAME OF BANK]
[BANK SIGNATURE]

ATTACHMENT B

From: Gregory.S.Sjostrom@wellsfargo.com [mailto:Gregory.S.Sjostrom@wellsfargo.com]
Sent: Thursday, January 22, 2015 4:49 PM
To: markforseth@rrv.net
Subject: FW: reference

Per our phone conversation I have attached the email I received listing the two issues Wells Fargo has with the proposed Letter of Credit terms presented to us.

Greg Sjostrom
Business/Ag Banker
Wells Fargo Bank
730 Center Ave 11 S Broadway/PO Box 644
Moorhead, MN 56560 Pelican Rapids, MN 56572
Phone # 218-287-3508 Phone # 218-863-5050
Fax # 218-287-3557 Fax # 218-863-2213
Cell # 701-361-3698 Cell # 701-361-3698
MAC # N9529-011 MAC # N9534-011
gregory.s.sjostrom@wellsfargo.com

From: O'connell, Brian T.
Sent: Friday, January 16, 2015 2:26 PM
To: Sjostrom, Gregory S.; Standby Review
Cc: Balenbin, Aurea C.
Subject: FW: reference

Greg,

USAC and the FCC do not allow much deviation and the LC contains two provisions that can be issues for us...

1. Expedited Payment

*In reference to the standby application that we will receive for your client; We would like to bring to your attention the following concern. The letter of credit contains a provision in the language whereby Wells Fargo Bank, N.A. is requested to make payment "**NEXT DAY**" in the event of a compliant drawing. Needless to say, this provision puts a great deal of risk on our operation and on our organization as a whole if we are unable to meet that requirement. The time frame allowed is close to impossible to meet. The industry standard that is acceptable today is up to 5 days and our internal standard is within 3 days. Since this provision will cause undue operational risk that we should not assume, we are referring the matter to your attention for assistance and ask that you do the following:*

Contact your client (the applicant) and ask that this provision be modified to allow for at least 3 days payment.

2. A copy of the notice of non-extension must also be sent to the FCC

In addition to our having to send a notice of non-extension to the Beneficiary USAC, we also need to send a copy of the notice of non-extension to the FCC. We normally only are willing to send copies of notices of non-extension to parties other than the Beneficiary if the terms of the LC spell out that such copy of notice is for informational purposes only and won't affect the notice of non-extension sent to the Beneficiary if the copy of the notice is not received per the terms of the LC. USAC and the FCC do not allow us to make the copy of the notice to FCC informational so notice must be received by both parties in order for any notice of non-extension to be valid.

Regards

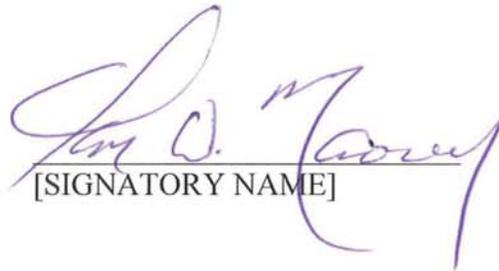
Brian

Declaration Under Penalty of Perjury

I, Tom Maroney, hereby state the following:

I am the Chief Executive Officer of Halstad Telephone Company. I have read the foregoing Petition for Reconsideration, which was prepared under my direction and supervision. I certify under penalty of perjury that the factual statements contained therein are true and correct to the best of my knowledge, information, and belief.

Executed on this 10th day of July, 2015.


[SIGNATORY NAME]