

**Before the
Federal Communications Commission
Washington, DC 20554**

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

To: Chief, Wireless Telecommunications Bureau

CONSOLIDATED REPLY OF CRICELLI, INC.

Cricelli, Inc. (“Cricelli”), by counsel and pursuant to the *Public Notice* released by the Wireline Competition Bureau (“Bureau”) on December 23, 2014,¹ hereby responds to the Comments and other submissions² regarding Cricelli’s request for waiver of rural broadband experiment program requirements that provisionally selected bidders provide three years of audited financial statements and technology and system design, including a network diagram, certified by a Professional Engineer (“PE”).³ In sum, no party has addressed, much less contested, the merits of either Waiver Request and the demonstration of “good cause,” instead

¹ *Public Notice*, “Wireline Competition Bureau Announces Availability of Additional Funding for Rural Broadband Experiments; Seeks Comment on Waiver Petitions of Provisionally Selected Bids,” DA 14-1889 (rel. Dec. 23, 2014 (“*Public Notice*”).

² See Comments of American Cable Association on the Waiver Petitions Filed by Provisionally Selected Bidders, WC Docket Nos. 10-90 and 14-259 (filed Jan. 6, 2015) (“ACA Comments”); Comments of NTCA – the Rural Broadband Association on Waiver Petitions of Provisionally Selected Bidders, WC Docket Nos. 10-90 and 14-259 (filed Jan. 6, 2015) (“NTCA Comments”); Comments of the United States Telecom Association, WC Docket No. 10-90 (filed Jan. 6, 2015) (“USTelecom Comments”); Comments of Midwest Energy Cooperative, WC Docket Nos. 10-90 and 14-259 (filed Jan. 6, 2015) (“Midwest Comments”); Statement in Response to Rural Broadband Experiment Waiver Requests, WC Docket Nos. 10-90 and 14-259 (filed Jan. 5, 2015) (“Utilities Comments”); Statement in Opposition of Rural Broadband Experiments Financial Waiver Requests, WC Docket Nos. 10-90 and 14-259 (filed Jan. 6, 2015) (“Skybeam Comments”); Comments of ViaSat, Inc., WC Docket No. 10-90 and 14-259 (filed Jan. 6, 2015) (“ViaSat Comments”).

³ See Cricelli Request for Waiver of Financial Requirements, WC Docket No. 10-90 (filed Dec. 19, 2014) (“Financial Waiver Request”); Cricelli Request for Waiver of Professional Engineer Certified Network Diagram, WC Docket No. 10-90 (filed Dec. 19, 2014) (“Technical Waiver Request,” and together with Financial Waiver Request, “Waiver Requests”).

relying on generalized, broadside allegations. Nor has any party countered the legal precedent cited by Cricelli demonstrating the Commission's historical approval of requests for waiver of financial and technical application requirements. The Bureau therefore should reject the opposing claims, grant the Waiver Requests and find Cricelli to be financially and technically qualified.

Background

By Public Notice dated December 5, 2014, the Bureau provisionally selected Cricelli's application for rural broadband experiment funding.⁴ Like other applicants that were provisionally selected, Cricelli was required to submit additional financial and technical information on Form 5620 by December 19, 2014. Cricelli timely submitted Form 5620.

In FAQs posted on the Commission's web site following release of the *Report and Order*,⁵ the Bureau stated that:

[i]f a winning bidder is unable to produce three consecutive years of financial statements, *it should file 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 can assess the entity's financial qualifications using the alternative evidence provided.*⁶

⁴ See *Public Notice*, "Wireline Competition Bureau Announces Entities Provisionally Selected for Rural Broadband Experiments; Sets Deadlines for Submission of Additional Information," DA 14-1772 (rel. Dec. 5, 2014) ("*Selection Notice*") at Attachment A.

⁵ *Connect America Fund; ETC Annual Reports and Certifications*, WC Docket Nos. 10-90, 14-58, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8769 (2014) ("*Report and Order*").

⁶ Rural Broadband Experiments – Frequently Asked Questions (FAQs), *available at* http://transition.fcc.gov/wcb/FAQs_Rural_Broadband_Experiments.pdf (last visited Dec. 11, 2014) (emphases added).

Similarly, the *Selection Notice* specifically stated that “[i]f a bidder is unable to meet all of these requirements, it must file a request for waiver and meet the requisite standards for waiver in order to be authorized to receive support.”⁷

Consistent with this guidance, Cricelli filed the Waiver Requests. Cricelli demonstrated its 20-year track record of successful operation of fixed broadband networks near the project area, and submitted three years of unaudited financial statements in its Form 5620. In addition, the Financial Waiver Request included Cricelli’s tax returns and annual bank statements for the three previous years, information that Cricelli indicated it had provided to its accounting firm to assist in the preparation of audited financial statements. The Technical Waiver Request included documentation to show that Cricelli is capable of meeting the technical requirements set forth in the *Report and Order*. Cricelli also demonstrated that grant of its Waiver Requests would be consistent with Commission decisions granting applications that did not strictly comply with financial or technical requirements because of compelling public interest concerns in expediting service to the public.⁸

Discussion

I. THE RECORD SUPPORTS GRANT OF THE WAIVER REQUESTS.

Section 1.3 of the Commission’s Rules permits the Commission to waive a rule for “good cause shown.”⁹ As the District Court held in *Northeast Cellular*, “[t]he Commission may exercise its discretion to waive a rule where the particular facts make strict compliance

⁷ *Selection Notice* at Attachment B, p.3.

⁸ See Financial Waiver Request at 2; Technical Waiver Request at 3.

⁹ 47 C.F.R. § 1.3.

inconsistent with the public interest. . . . The Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy *on an individual basis*.”¹⁰

No commenter addressed the specific facts and circumstances that Cricelli advanced in its Waiver Requests.¹¹ Rather, each makes generalized statements that simply recite the rural broadband experiment requirements,¹² discuss the policy behind the inclusion of the application requirements,¹³ or discuss their own applications and self-interest without any discussion of the individualized facts.¹⁴ To the contrary, Cricelli provided detailed alternative financial and technical information to demonstrate “good cause” for waiver of the program requirements.

The Commission considers requests for waiver of a rule on a case-by-case, individualized basis.¹⁵ Each waiver request must be considered on a fact-specific basis, and “each must be judged individually.”¹⁶ The Commission, therefore, must consider Cricelli’s Waiver Requests on

¹⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”) (emphasis added). *See also* ACA Comments at 1 n.2.

¹¹ NTCA expressly stated that it “does not comment in this filing upon the case-by-case merits of any waiver application” but “suggests that Commission’s evaluation of the waiver petitions should be informed by individualized, plain and logical positioning of the stated reasons for relief....” NTCA Comments at 2.

¹² *See* Skybeam Comments at 2; Utility Comments at 1.

¹³ *See, e.g.*, USTelecom Comments at 3-4. Although USTelecom “objects to all of the waiver requests,” it did not specifically include Cricelli’s Waiver Request in indicating the “various petitions for waiver” it opposed. USTelecom Comments at 2 & 1 n.2. Nevertheless, to remove any uncertainty, Cricelli will address those of USTelecom’s arguments that are relevant to its Waiver Requests, but need not address arguments related to arguments that other applicants perhaps presented, such as the lack of business operations for three years or the lack of time to submit audited financial statements. *See id.* at 3. *See also* Utilities Comments at 2 (lack of time to submit information not relevant to Cricelli); Midwest Comments at 2-3 (rules well known in advance); Skybeam Comments at 2 (lack of business operations for three years or more).

¹⁴ *See* Midwest Comments at 2.

¹⁵ *See, e.g., Lawrence Behr Application for Modification of 220-222 MHz Station WPWR222*, Memorandum Opinion and Order, 61 CR 989, ¶ 134 n. 125 (rel. Dec. 17, 2014).

¹⁶ *See, e.g., Schools and Libraries Universal Service Support Mechanism*, Fifth Report and Order, 19 FCC Rcd 15808, 15833 ¶ 75 n. 134 (rel. Aug. 13, 2004).

the individual facts presented and should not consider the broad sweeping oppositions that do not address the individual merits of Cricelli's requests.

Notwithstanding the generic and facially deficient oppositions of certain commenters, the public interest supports grant of the Waiver Requests. USTelecom argues that “[a]udited financial statements are an essential showing for the Commission to make this determination and are typically requested in Commission auctions.”¹⁷ This point misses the mark. First, the submission of audited financial statements is not essential where, as here, Cricelli has submitted substantial alternative factual information concerning its successful track record and finances, and has committed to obtaining the letter of credit that will protect the Commission's investment and allow the funded project to proceed. That is the very purpose of a waiver – to show that alternative information can serve as an adequate substitute for required information where the public interest would benefit. Additionally, the mere filing of audited financial statements does not necessarily equate to an entity's financial viability. Second, USTelecom is simply wrong in its citation of Commission rules that purportedly require audited financial statements.¹⁸ Sections 101.1209(d) and 24.720(f) impose no such obligations on competitive bidding winners. Furthermore, Section 101.1209(d) is not even a current Commission rule.¹⁹ Instead the Commission relies on Section 1.2110(o) of its rules, which expressly allows for an alternative showing where an applicant does not submit audited financial statements.²⁰ In any event, as Cricelli stated in its Financial Waiver Request, the Commission has the authority to waive its

¹⁷ USTelecom Comments at 2-3.

¹⁸ *See id.* at 2-3 & n.9.

¹⁹ The rule was removed in 2002. *See Amendment of Parts 1, 21, 22, 24, 25, 27, 73, 74, 80, 90, 95, 100, and 101 of the Commission Rules - Competitive Bidding*, 17 FCC Rcd 6534, 6554 ¶ 17 (rel. Apr. 11, 2002).

²⁰ 47 C.F.R. § 1.2110(o) (allowing an entity's chief financial officer or the equivalent to certify to unaudited financials when an entity does not otherwise use audited financials).

financial requirements, and has done so in the past where the financial information was filed post-auction and the public interest warranted.²¹

USTelecom also argues that “[f]ailing to enforce the requirements for all participants at this stage sets a precedent for leniency with respect to the upcoming CAF Phase II auction.”²² This argument ignores the fundamental purpose of the rural broadband experiment program – “to advance the deployment of voice and broadband-capable networks in rural, high-cost areas, including extremely high-cost areas, while ensuring that rural Americans benefit from the historic technology transitions that are transforming our nation’s communications services.”²³ Further, as an experimental program, the Commission’s “goal is to quickly gather data from submitted formal proposals about various technologies in different geographic areas to inform our judgment as we address important policy issues regarding how to maintain universal access in rural areas during technology transitions.”²⁴ The requirements for the rural broadband experiment program are intentionally designed so the Commission can learn what works well and what does not as it fashions final rules for CAF Phase II competitive bidding. Requiring strict adherence to these rules without any sort of leniency would be counter to the Commission’s goals. It is possible that, going forward, the Commission may wish to change its financial qualification requirements, but that is no reason to prejudice provisionally selected applicants that accepted the Commission’s invitation to file requests for waivers where they could not meet the specific financial requirements.

²¹ To the extent the Bureau’s “good cause” analysis should include a review of an applicant’s track record, as NTCA suggests, the Waiver Requests demonstrate Cricelli’s long history of successful operation of broadband networks near the funded area. *See* Financial Waiver Request at 1, 2; Technical Waiver Request at 1, 2.

²² USTelecom Comments at 3.

²³ *Report and Order* at ¶ 1.

²⁴ *Id.* at ¶ 10.

The Utilities argue, without any support whatsoever, that “any waivers given may complicate and delay the CAF Phase II process.”²⁵ To the contrary, approving the waivers will inform the CAF Phase II process, allow the provisionally selected applicants to move forward and expedite the deployment of broadband service to rural Americans. The Utilities’ conclusory claim has no merit.

Likewise, grant of the Waiver Requests will not be detrimental to any other provisionally selected recipient, as a few commenters suggest.²⁶ Those applicants that demonstrated their qualifications without seeking waiver will be unaffected by the Bureau’s resolution of the Waiver Requests. Moreover, the Bureau must make decisions based on the merits of the Waiver Requests and the other individualized waiver requests before it assesses the qualifications of any applicant that has “next-in-line” rights.

Finally, ACA suggests that the Commission could make a finding of “good cause” where the applicant has been operating for three consecutive years and commits to provide audited financial statements within 120 days.²⁷ This condition would shift the financial burden inherent in obtaining audited financial statements only to those applicants that were provisionally selected, rather than requiring *all* applicants, regardless of whether they are selected or not, to take steps to obtain the audited statements.²⁸ As ACA correctly points out, this would be an expensive and perhaps wasteful exercise for small businesses to undertake.²⁹ Cricelli does not believe that the Bureau needs to condition its approval of the Financial Waiver Request on a

²⁵ Utilities Comments at 2.

²⁶ See, e.g., Midwest Comments at 2; Utilities Comments at 2; Skybeam Comments at 3.

²⁷ See ACA Comments at 3.

²⁸ See *id.* at 3 n.6.

²⁹ See *id.* at 3 n.7.

requirement that an applicant produce audited financial statements if the alternative information is deemed acceptable. Moreover, the Commission itself has always been concerned about the “resources that entities need to spend upfront” and expected that the information required to be submitted, such as audited financials, would be information that winning bidders already have on hand.³⁰ To the extent provisional winners do not have audited financials “on hand,” consistent with precedent, the Commission should use acceptable alternative information, such as the financial information submitted by Cricelli.

With respect to the requirement that winning bidders submit technology and system design, including a network diagram certified by a PE, certain commenters argue that a waiver request is inappropriate and unwarranted. Specifically, NTCA argues that “waivers from *technical, deployment or other service-related* obligations should not be issued on the basis of recent market entry or other condition related to an applicant’s lack of experience.”³¹ Midwest essentially argues that viable entities should be able to comply with this requirement.³² As Cricelli demonstrated in its Technical Waiver Request, the company has a long-established history of providing fixed broadband services. It is not requesting a waiver because it lacks experience. Instead, Cricelli, after repeated efforts, was unable to find a PE familiar with the issues unique to the census blocks within Cricelli’s bid project. This does not mean that Cricelli is not a viable entity. Rather, the unique circumstances present here warrant a waiver of the Commission’s requirements to submit a network diagram certified by a PE.

³⁰ *Report and Order* at Appendix B ¶ 71.

³¹ NTCA Comments at 3 (emphasis in original).

³² Midwest Comments at 2.

II. THE BUREAU SHOULD REJECT VIASAT'S REQUEST TO WITHHOLD PROCESSING OF THE WAIVER REQUESTS.

ViaSat asks the Bureau to hold in abeyance action on the waiver requests until the full Commission acts on its pending Application for Review of the Bureau's denial of its request for waiver of the latency requirement applicable to rural broadband applicants.³³ Cricelli has no comment at this time on ViaSat's issues before the Commission, but submits that there is no reason for the Bureau to withhold action on fifteen waiver requests while it waits for the Commission to consider ViaSat's separate and distinct concerns. To do so would interpose unnecessary delay in the processing of rural broadband experiment applications and the deployment of fixed broadband facilities to rural Americans.

Conclusion

The Bureau should promptly grant the Waiver Requests. No commenter has challenged Cricelli's specific good cause showings, which provided sufficient alternative information for the Bureau to conclude that it is financially and technically qualified to receive rural broadband experiment support.

Respectfully submitted,

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³³ ViaSat Comments at 9.