Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
Rural Broadband Experiments	)	WC Docket No. 14-259
	)	
Last Mile Broadband LLC	)	
Request for Waiver of Three Years of	)	
of Audited Financial Statements	)	

TO: THE COMMISSION

APPLICATION FOR REVIEW
LAST MILE BROADBAND LLC

Pursuant to Section 1.115 of the Federal Communications Commission's ("Commission" or "FCC") rules,[1] and by and through its undersigned counsel, Last Mile Broadband LLC ("Last Mile" or the "Company"), do hereby respectfully request the Commission to review the Order of Wireline Competition Bureau ("Bureau"), released January 30, 2015, DA 15-139 ("Dismissal Order") as to: (1) whether the Bureau's decision to seek public comment on Last Mile's Request for Waiver was an unlawful delegation of its decision-making authority; (2) whether the Bureau's Order summarily denial of the Company's Request for Waiver without a case-by-case analysis is arbitrary and capricious and otherwise contrary to the law and policy of the Commission; and (3) whether the Bureau's decision to remove the Company's application from further consideration for Rural Broadband Experiment ("RBE") funding is arbitrary and capricious and otherwise contrary to the law and policy of the Commission, warranting reinstatement of Last Mile's application *nunc pro tunc*.

The Company submits the following in support of its Application for Review.

I. INTRODUCTION AND BACKGROUND

A. The Commission Created a Perception and Established a Policy that the RBE Was to Create a Diversity of Applicants and Attract New Entrants.

In 2011, the Commission determined that it would use competitive bidding as a means for awarding funding of the Connect America Fund ("CAF") for Phase II where prior price cap carriers declined to make a commitment to provide supported services and broadband Internet access to the entire study area,

[1] 47 C.F.R. §1.115 (2015).

primarily rural and Tribal areas.[2] In 2014, the Commission also determined that it would conduct a RBE to determine the level of interest from other non-price cap carriers, and encouraged proposals "from a wide range of entities and consortia of entities, including State and regional authorities, research and education networks, *municipalities*, Tribal governments, cable operators, competitive local exchange carriers, incumbent local exchange carriers, fixed and mobile wireless providers, *wireless Internet service providers*, utilities and others."[3] It encouraged participation in a two-part process of an informal expression of interest and formal application of cost models through competitive bidding.[4]

In June 2014, the Commission established a budget for its RBE and the application process for selecting provisional winning applications for CAF support.[5] In doing so, the Commission established a process for ensuring compliance with both its application and construction requirements.[6] However, the Commission dedicated a section in this RBE Report & Order to waivers:

> *In the event a recipient is unable to meet the terms and conditions of the rural broadband experiments due to circumstances beyond its control (e.g., a severe weather event), that entity may petition for a waiver of the relevant terms and conditions prior to the relevant build-out milestone pursuant to section 1.3 of the Commission's rules. The petitioning entity will then have the cure period described above to meet the terms and conditions of the experiment. We encourage entities that submit petitions for waiver to continue to work diligently towards meeting the terms and conditions of their experiments while their petitions are pending.*[7]

More importantly however, the Commission, in a September 25, 2014, Frequently Asked Questions ("FAQs") document posted on its RBE page of the Commission's website, specifically delineated the procedures to be taken for the provisional award financial qualification process.

> ***F. What should an entity do if its newly-formed and does not have three years of audited financial statements available?***
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> *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 of a case-by-case basis whether it can assess the entity's financial qualifications using the alternative evidence provided.*[8]

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[2] *In the Matter of Connect America Fund, et al.*, Report and Order, 26 FCC Rcd 17663 (2011), *aff'd sub nom. In re FCC 11-161*, 753 F.3d 1615 (10th Cir. 2014) ("*Transformation Order*").

[3] *In the Matter of Technology Transitions et al.*, Order, 29 FCC Rcd 1433 at 1470, 1474 (2014) ("*Technology Transition Order*") (emphasis added).

[4] Id at 1474, para. 105.

[5] *In the Matter of Connect America Fund, ETC Annual Reports and Certification*, WC Docket Nos. 10-90 and 14-58, 29 FCC Rcd 8769 (2014) ("RBE Report & Order").

[6] *Id.* at 8798-8800, paras. 88-94.

[7] *Id.* at 8800, para. 95.

[8] The Commission staff has conveniently revised its FAQs document on February 13, 2015 and has omitted these and other instructions on the waiver process for provisional RBE awardees.

B. The Commission Expressed Excitement over the Diversity of Interest in RBE and Provisionally Selected Last Mile as an Awardee Based on its Cost Model, but Denied the Company's Request for Waiver.

On March 7, 2014, Last Mile and over 1000 entities expressed interest in participating in the RBE, and the FCC issued a News Release expressing its excitement over the number of diverse entities that so shared the Commission's glee of dedicating CAF for rural, underserved and unserved areas and Tribal lands throughout the United States.[9] Included in its Expression of Interest, Last Mile notified the Commission of its unique status that it was participating the RBE through a public-private partnership with Prince George's County, Maryland ("County"). Indeed, the Company's Expression of Interest as well as a Letter of Support from the County specifically outlined the financial, tangible and intangible resources that would be available to Last Mile to assist the County in becoming a Giga-bit capable jurisdiction and extend its fiber optic broadband network to areas currently unserved in the County, its "rural tier."[10]

Furthermore, once the RBE application filing window opened, almost 200 applicants filed applications for CAF funding for which the Commission was ecstatic.[11] Last Mile was one of those applicants, and in its application, the Company disclosed to the Commission that it was a "home-grown" start-up company that was established in 2012 and qualified for Minority Business Enterprise status. With both its Expression of Interest filing and Project Information document filed with FCC Form 5620, the Bureau's staff was well aware of Last Mile's nascent corporate history. More importantly, the Bureau's staff was equally aware of the financial assistance, tangible and intangible assets that the County committed to provide to ensure that Last Mile met its financial and technical qualifications as well as the state-of-the-art hybrid fiber and wireless network that Last Mile plans to deploy. The Commission provisionally selected Last Mile for RBE on December 5, 2014.[12]

On December 19, 2014, Last Mile filed a Request for Waiver of the three-year audited financial statements requirement as well as sought additional time to submit a professional engineer- certified network design. In its Request for Waiver, Last Mile explained to the Commission that it was a start-up company that had not been in existence for three years, and that it was impractical to meet this financial qualification requirement. Instead, in the body of its Request for Waiver, Last Mile asked the Bureau staff to consider its unique public-private partnership and the financial assistance, tangible and intangible

[9] *See* Last Mile Broadband LLC Expression of Interest and Letter of Support prepared by Prince George's County, Maryland filed in *Rural Broadband Experiments Order,* March 7, 2014.
[10] *Id.*
[11] *See Rural Broadband Experiments Draws Interest from Almost 200 Applicants*, WC Docket Nos. 10-90, 14-58, News Release, (FCC rel. Nov. 12, 2014).
[12] Wireline Competition Bureau Announces Entities Provisionally Selected for RBE; Sets Deadlines for Submission of Additional Information, Public Notice, DA 14-1772, rel. Dec. 5, 2014.

assets that would be available to it from the County. Specifically, Last Mile re-identified those four commitments (taken from the County's Letter of Support during the Expression of Interest stage) in its Request for Waiver. They are: 1) additional funding for building the backbone or middle-mile connectivity to support the build out of the last mile wireline and wireless broadband connectivity to the proposed service area; (2) access to key County assets such as fiber, conduit, utility poles and real estate; (3) assist with accessing state-owned resources such as towers and fiber networks; and (4) streamline local permitting and inspection process to support the Company's network construction.[13] Fourteen (14) other provisional RBE awardees, mostly start-up companies, also filed a request for waiver of the Commission 3-years of audited financial statements requirement.

On December 23, 2014, in an unprecedented case of administrative and legal review of the Requests for Waiver and delegation of its governmental duty, the Bureau staff sought public comments on Last Mile's waiver request and that of the 14 other petitioners. Indeed, the Bureau staff relegated its governmental duty to the public asking to public to comment on whether petitioners "have submitted sufficient alternative information to establish that they are financially capable."[14]

Some commenters filed comments objecting the grant of the waiver requests, including but not limited to, American Cable Association, Midwest Energy Cooperative and Skybeam LLC. Last Mile and the other petitioners noted that the Commission anticipated there would be special circumstances that warranted a waiver and devoted a section in its RBE Report & Order to waivers. The Rural Broadband Services Corporation, Inc. noted that the Commission did not intend to categorically exclude start-up companies because of the specific instructions provided in its FAQs if bidders were unable to produce three years of audited financial statements.

Last Mile's Request for Waiver also sought additional time in which to submit its network design that was certified by a professional engineer. In its FCC Form 5620 filing, the Company timely filed a network design, which was not certified by a professional engineer. However, on January 16, 2015, *prior to* the Bureau's Dismissal Order, Last Mile re-filed its network design that was certified by a professional engineer.

Nevertheless, on January 30, 2015, the Bureau summarily denied Last Mile's waiver request without a case-by-case analysis and removed its application for RBE CAF funding from further consideration. The Bureau reasoned that:

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[13] *See* Last Mile Broadband LLC Request for Waiver filed December 19, 2014.

[14] *See Wireline Competition Bureau Announces Availability of Additional Funding for RBE; Seeks Comment on Waiver Petitions of Provisionally Selected Bidders*, Public Notice, DA 14-1889, rel. Dec, 23, 2014.

strict enforcement of the deadlines and filing requirements adopted by the Commission is appropriate given the accelerated time frame for the rural broadband experiments. Granting such relief would preclude consideration of other applicants that were able to submit the requisite financial and technical showings within the time frame established by the Commission. Denying the waiver requests and proceeding to identify next-in-line bidders fulfills the Commission's objective for the rural broadband experiments to 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, while not delaying implementation of Phase II.[15]

The Bureau further justified its decision not to conduct a case-by-case analysis of Last Mile's Request for Waiver because such evaluations would require a "resource-intensive effort" and a "protracted effort to determine whether the Petitioners have successfully demonstrated their financial capability."[16]

As part of its justification the Bureau also quoted comments and reply comments from the public:

The Commission intended for the rural broadband experiments to provide critical information regarding the interest and ability of alternative providers to build networks that deliver robust services for an amount of money equal to or less than the support amounts calculated by the adopted Phase II Connect America Cost Model. Through both the expression of interest stage and the application stage of the experiments, we have learned a great deal about the level of competitive interest in providing such services. However, we must balance that interest with our duty as stewards of public funding. We therefore must ensure that the finite rural broadband experiments budget is distributed to entities that provide concrete evidence of their financial and technical capability to fulfill their commitment not only to build voice and broadband capable networks, but also to provide reasonably comparable services at reasonably comparable rates.[17]

II. QUESTIONS PRESENTED

A. Whether the Bureau's decision to seek public comment on Last Mile's Request for Waiver and rely on those comments a justification of its Dismissal Order was an unlawful delegation of its decision-making authority?

B. Whether the Bureau's Dismissal Order summarily denial of the Company's Request for Waiver without a case-by-case analysis is arbitrary and capricious and otherwise contrary to the law and policy of the Commission because it: (1) establishes a policy that prevents awarding RBE funding to start-up companies contrary to the Commission's RBE Report& Order created policy that encouraged a diverse range of RBE applicants, including start-up companies; (2) determines a question of law, fact and policy not previously espoused by the Commission; (3) establishes policy in excess of its delegated authority and contrary to the rules and procedures permitting waivers; and (4) creates an unlawful precedent and policy contrary to the public interest that the Commission should overturn?

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[15] Dismissal Order at para. 5.
[16] *Id.* at para. 7-8.
[17] *Id.* at para. 6, citing comments and reply comments of Minnesota Telecom Alliance, Midwest Energy Cooperative and U.S. Telecom Association.

C. Whether the Bureau's decision to remove the Company's application from further consideration for Rural Broadband Experiment ("RBE") funding is arbitrary and capricious and otherwise contrary to the law and policy of the Commission, warranting reinstatement of Last Mile's application *nunc pro tunc*?

III. ARGUMENT

A. The Bureau's Decision to Seek Public Comment on Last Mile's Request for Waiver and Rely on those Comments to Deny the Company's Request is an Unlawful Delegation of its Decision-Making Authority

Section 1.3 of the Commission's rules establishes the standards by which the Commission or its staff will evaluate requests for waiver of its rules.[18] Nowhere, in this rule section does the Commission provide for the seeking of public comment on a request for waiver. More importantly, the rule is clear that each request will be evaluated on its own merits on a case-by-case basis. Additionally, the rule section does not indicate that the FCC or its staff under delegated authority can rely on the public's comments as justification for decision.

Moreover, the Commission's RBE Report & Order was clear that any RBE awardee could seek a waiver of its rules,[19] and as stated *supra*, the Commission specifically provided instructions to start-up companies that a waiver of the 3-years of audited financial statements was permitted and set forth the parameters for additional showings that can support a waiver of this financial qualification requirement.

The Bureau's instructions on how to evaluate the requests for waivers ended with Section 1.3, the RBE Report & Order and the FAQs posted to the RBE page on the Commission's website. Reliance on any other sources, including public comment, was an unlawful delegation of its decision-making authority.

B. The Bureau's Dismissal Order Summarily Denial of the Company's Request for Waiver without a Case-by-Case Analysis is Arbitrary and Capricious and Otherwise Contrary to the Law and Policy of the Commission

Only 15 provisional awardees sought a Request for Waiver, and each of those waivers were relatively short in their justification for the requests. How a case-by-case analysis of each of these petitioners would have been an extraordinary "resource-intensive effort" is beyond reasoning. Additionally, the initial provisional RBE awardees are still in the qualification stage as the requirement to obtain Eligible Telecommunications Carrier designation is not due until March 5, 2015. It appears that the Bureau had and still has additional time in which evaluate the petitioners' requests and still be within the initial timeframe of technical and financial qualifications of the initial provisional RBE awardees.

[18] 47 C.F.R. §1.3 (2015).
[19] RBE Report & Order at 8800, para. 95.

More importantly, the Bureau never addressed Last Mile's unique filing status of having a public-private partnership with the County and did not factor in the County's financial contribution commitment to the Company's RBE efforts or its tangible assets (access to the middle fiber network and communications towers) and intangible assets (streamlining approval of the permitting process). The Bureau's failure to analyze these assets on a case-by-case basis for Last Mile was contrary to Section 1.3 of the Commission's rules and violates the Administrative Procedure Act, 5 U.S.C. §706(2)(A) as arbitrary and capricious.

1. Contrary to the RBE Report & Order, the Bureau's Dismissal Order created a policy of denying start-up companies' participation in RBE.

Last Mile is a start-up limited liability company incorporated in Maryland in July 2012. Like many of the petitioners seeking waiver of the 3-years of audited financial statements, it has not been existence long enough to meet the Commission's financial qualification requirements. However, in its RBE Report and Order, the Commission sought to include the widest participation in RBE from a diverse group of applicants, including municipalities and wireless Internet Service providers ("WISPs"). It is well-known throughout the industry that many WISPs are small, start-up companies like Last Mile. Surely, the Commission sought to encourage as many diverse participants in the RBE as possible.[20]

A fundamental part of the RBE was its pronouncement on waivers. It foretold that there would be instances that a RBE awardee would not be able to meet the specific deadlines or guidelines of its order. It encouraged awardees to "continue to work diligently towards meeting the terms and conditions of their experiments while their petitions are pending."[21] Something that Last Mile did, for example, when it re-filed its P.E.-certified network design *prior to* the Bureau's Dismissal Order. The Commission recognized that some entities may have hardships or circumstances beyond its control, but nevertheless encouraged those RBE awardees' continued participation in RBE.

The Bureau's summary dismissal of Last Mile's request for waiver without an evaluation on the merits of its request in essence usurped the Commission's pronouncement in the RBE Report & Order. The Bureau's action created its own policy of excluding start-up companies, like Last Mile, from participation in RBE. It supplanted the policy, question of law and fact of the Commission with its own, and illegally relied on public comment as its justification, which is beyond its delegated authority that permits review of waivers under the established guidelines of Section 1.3 of the Commission's rules.

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[20] Id at 8776, para. 14.
[21] *Id.*

The Bureau's decision also created an unlawful precedent that is contrary to public policy. By seeking public comment of Last Mile's request and relying on those comments as justification for its decision, it created a precedent in the application process akin to a rulemaking proceeding, where public comment is commonplace. This is unlawful and contrary to the public policy interest that Commission illuminated would be necessary to ensure robust participation in the RBE.

C. The Bureau's Decision to Remove Last Mile's Application from RBE Further Consideration was Arbitrary and Capricious, and the Company's Application Should be Reinstated *Nunc Pro Tunc*

Not only did the Bureau summarily deny Last Mile's Request for Waiver, it removed the Company's application for further consideration in the RBE proceeding. Last Mile believes that because the Bureau's action did not follow FCC policy in its RBE Report & Order, nor did it follow the procedures set forth in Section 1.3 of the Commission's rules, the actions were not within its delegated authority. Therefore, removal of its application from continue RBE participation was unlawful, arbitrary and capricious, and Last Mile's application should be reinstated *nunc pro tunc.*

It is well-settled administrative law that an agency actions are arbitrary and capricious when they do not provide a reasonable explanation that connects the "facts found" and the "choice made."[22] The Commission set forth the impetus of RBE as rural areas cost more to deploy broadband services, particularly at higher rates of speed of service, and therefore have traditionally been denied access to high-speed Internet. The Commission also indicated that it lacked information on what alternative business models and technologies would best suit the planning of competitive bidding for CAF Phase II funding. The FCC sought to include a wide and diverse range of RBE applicants to form a basis for conducting the competitive bidding rules for Phase II CAF.

However, the Bureau's removal of Last Mile and other start-up applicants from continued participation in RBE proceeding will not provide the information on the most innovative broadband service available to serve rural areas. It is clear that major players will not make the investment in rural areas. Otherwise, those areas would have service already and this proceeding would be moot. Real innovation will come from the rural and unserved communities and their governing municipalities, making the infrastructure investment or from smaller providers like Last Mile whose principals have a vested interest in seeing their communities prosper with advanced broadband technology. Removal of Last Mile and other start-up companies from this opportunity is contrary to the public interest, and does

[22] *Kristin Brooks Hope Center v. FCC*, 626 F.3d 586, 591 (D.C. Cir. 2010).

not give the Commission the information it needs to determine how best to structure Phase II CAF competitive bidding to include a diverse group of applicants.

If the Bureau was truly interested in being a good steward over the public funds as it states in its Dismissal Order, then it should not remove Last Mile or other start-up provisional awardees from the RBE, which had the highest cost effective cost-model scores. By removing Last Mile, which proposed to offer service substantially better than that required by the model at a reduced cost, without analyzing its waiver request individually, is arbitrary and capricious, and guarantees that higher cost models will dominate the Commission's RBE budget (and presumably Phase II CAF). This is not in the public interest. Therefore, Last Mile's application should be reinstated as having a lowest cost model and as serving the public interest.

IV. CONCLUSION AND RELIEF REQUESTED

Based on the foregoing, Last Mile Broadband LLC respectfully requests: (1) the Dismissal Order be reversed, rejecting the Bureau's "no waivers for start-up companies" policy for both the RBE and Phase II CAF competitive bidding; (2) grant of its Request for Waiver; and (3) it be reinstated as a provisional RBE awardee, *nunc pro tunc*.

Respectfully submitted,

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February 25, 2015

CERTIFICATE OF SERVICE

I, Tamara Davis Brown, certify that on February 26, 2015 copies of the foregoing Application for Review of Last Mile Broadband LLC in WC Docket No. 10-90 were served on the following parties:

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