

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

**PETITION FOR RECONSIDERATION OF  
Michael D. Donnell d/b/a SAN JOAQUIN BROADBAND**

To: Deputy Chief, Wireline Competition Bureau

Michael D. Donnell dba SAN JOAQUIN BROADBAND (a newly-formed entity, “SJB”), pursuant to Section 1.106 of the Commission’s rules, hereby petitions the Wireline Competition Bureau (“Bureau”) to reconsider the denial of SJB’s petition for waiver<sup>1</sup> (“Waiver Request”) in the Order by its Deputy Chief released January 30, 2015, DA 15-139 (“Order”) for the reasons warranting reconsideration that are presented in this petition. Coincidentally, on the same date as the release of the Order, to meet the Commission requirements to receive funding support, SJB had submitted in its Rural Broadband Experiments (“RBE”) FCC Form 5620 application (“RBE Application”) a Commitment Letter to issue an Irrevocable Standby Letter of Credit (“LOC”) from a bank that is among the 100 largest banks in the U.S.<sup>2</sup> (“LOC Commitment Letter”). And subsequently, after the Order effectively changed the original requirement for newly-formed entities to file a waiver in lieu of filing three years audited financial statements, on February 27, 2015, SJB submitted in its RBE Application audited

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<sup>1</sup> Letter from Stephen E. Coran, Counsel for Michael D. Donnell d/b/a San Joaquin Broadband, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Dec. 17, 2014).

<sup>2</sup> *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) (“Rural Broadband Experiments Order”) at ¶59.

financial statements, including balance sheets, net income, and cash flow, dating back to its inception. Therefore, in light of these new facts, SJB has strictly complied with all the Commission requirements as were given, and subsequently modified by the Bureau, for newly-formed entities to participate in the rural broadband experiments. Accordingly, and given the public interest benefits that will result, including the fact that granting the waiver will not result in any delay to the Bureau conducting the rural broadband experiments, the Bureau should, on reconsideration, grant SJB's Waiver Request and reinstate SJB for further consideration of support. In support of this petition the following is shown:

## **I. BACKGROUND AND INTRODUCTION**

By Public Notice dated December 5, 2014, the Bureau provisionally selected SJB's application for Category One RBE funding.<sup>3</sup> Subject to submission of additional information and a final determination of SJB's technical and financial qualifications, SJB was to receive \$14,833,187 to fund construction and operation of fixed broadband and telephone services in 2,585 census blocks in California ("Unserved Blocks").

The Commission mandated that an entity provisionally selected for rural broadband experiment must demonstrate that it has the technical and financial qualifications to successfully complete the proposed project within the required timeframes.<sup>4</sup> To enable the Commission staff to perform a review of a selected bidder's financial qualification, the Commission set forth a requirement for provisionally selected bidders to provide three consecutive years of audited financial statements.<sup>5</sup> The Commission and its staff, however, also recognized that this

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<sup>3</sup> See *Public Notice*, DA 14-1772 (rel. Dec. 5, 2014) ("*Public Notice*").

<sup>4</sup> Rural Broadband Experiments Order at ¶52.

<sup>5</sup> Rural Broadband Experiments Order at ¶¶54, 63.

requirement was an impossible feat for newly-formed entities, even though such entities may be the best candidates to serve the public interest and accomplish the purposes of the rural broadband experiment. Therefore, the Bureau, operating under delegated authority of the Commission, posted on the Commission’s website in its RBE FAQ very specific instructions for newly-formed entities to instead “file for a waiver of this requirement after it has been named as a winning bidder.”<sup>6</sup>

## **II. SJB STRICTLY FOLLOWED THE REQUIREMENTS SET FORTH BY THE COMMISSION FOR THE PARTICIPATION OF NEWLY-FORMED ENTITIES**

In the late summer of 2014, after learning of the RBE and before beginning the process to create its RBE bids, SJB wanted to know whether startups were welcome to participate in the RBE. In light of the three year audited financial statement requirement, SJB worried that startups were not welcome to participate as this requirement could only, by its nature, apply to existing entities with more than three years of operations. However, after reviewing the question and answer posed in the RBE FAQ that specifically addressed what a newly-formed entity should do regarding the three year audited financial statement requirement, as would be expected by any reasonable interpretation, SJB determined that the Commission was indeed interested in the participation of startup entities in the RBE and CAF Phase II grants. After this determination, SJB began what became a vigorous effort into creating thoroughly planned and competitive RBE bids. Over five months time, SJB relied on this statement and put forth the large effort and

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<sup>6</sup> Rural Broadband Experiments – Frequently Asked Questions (FAQs) at V. Application Process - ¶F., available at [http://transition.fcc.gov/wcb/FAQs\\_Rural\\_Broadband\\_Experiments.pdf](http://transition.fcc.gov/wcb/FAQs_Rural_Broadband_Experiments.pdf) (first downloaded on Aug 30, 2014; last downloaded and viewed Mar 3, 2015) ("RBE FAQ"). On February 12, 2015 an updated version of the RBE FAQ was posted at a slightly modified URL of [http://transition.fcc.gov/wcb/FAQ\\_Rural\\_Broadband\\_Experiment.pdf](http://transition.fcc.gov/wcb/FAQ_Rural_Broadband_Experiment.pdf) (last viewed Mar 3, 2015) (“RBE FAQ v2”) with the quoted question removed.

expense to create a business plan; to create a network plan; to arrange for financing; to arrange for an irrevocable letter of credit, and to coordinate all the resources that would be necessary to successfully execute on its plans and deliver broadband and voice services to the Unserved Blocks in its bids.

After learning that four of its submitted bids had been provisionally selected for RBEs, and to ensure that it properly followed all the Commission's requirements, SJB diligently re-reviewed all the Commission publications regarding the RBE and spoke with Commission staff to ensure that it was strictly following all the requirements as they pertained to SJB as a newly-formed entity. At this point, SJB had already expended a large amount of resources and was about to invest more resources in the legal, banking, and professional engineering work to complete the RBE Application, and it did not want its resources to go to waste because of an error in its application or because the Commission would ultimately disallow newly-formed entities from participating.

In the Form 5620 Filing Instructions attached with the *Public Notice* given to provisionally selected bidders, it states the following:

If a bidder is unable to meet all of these requirements, it must file a request for a waiver and meet the requisite standards for waiver in order to be authorized to receive support. To the extent any bidder believes it must seek a waiver, *it should contact Bureau staff in advance of filing to determine the procedures for submitting such a request consistent with the Commission's rules.*<sup>7</sup> (emphasis added)

In a telephone conversation the week of Dec 9th with Ian Forbes, one of the Commission staff members listed in the Form 5620 Filing Instructions to call for questions regarding waivers, SJB was told by Mr. Forbes that as a newly-formed entity the Commission was expecting that

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<sup>7</sup> *Public Notice* ATTACHMENT B at II. POST-SELECTION REVIEW PROCESS: REQUIRED INFORMATION AND DEADLINES - ¶D. Conditions for Funding Authorization.

SJB would file for a waiver of the audited financial statement requirement. Mr. Forbes instructed SJB to file a waiver that included information that was used to prepare and submit its bids along with any additional information that SJB felt would show that its bids were financially feasible.

Also, regarding the type of information to include in a waiver the RBE FAQ states that newly-formed entities “*should* submit with its waiver petition evidence that demonstrates it is financially qualified.”<sup>8</sup>

Based on the repeated instruction in the Commission’s published documents and instruction from Commission staff, SJB, by filing its Waiver Request along with its alternative evidence, was strictly following the requirements. The lack of any further detail of instructions given for newly-formed entities also left SJB to make its best judgement of what informational evidence that it should include in its waiver to best demonstrate to the Bureau that it is financially qualified.

On December 17, 2014, SJB filed its Waiver Request in strict adherence to the instructions given it from the Bureau for newly-formed entities, and included with the waiver what it concluded to be the best alternative evidence, in lieu of audited financial statements, to show its financial capability and qualification.

### **III. THE ORDER EFFECTIVELY CHANGED THE RULES FOR PARTICIPATION OF NEWLY-FORMED ENTITIES**

In its Order the Bureau denied all waivers, including those of newly-formed entities that were specifically following the instructions set forth by the RBE FAQ. It justified its decision for various reasons, including that it “must ensure that the finite rural broadband experiments budget is distributed to entities that provide *concrete evidence* of their financial and technical capability”

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<sup>8</sup> RBE FAQ at V. Application Process - ¶F.

(emphasis added). It also criticized SJB's Waiver Request stating that it "provide[d] no *independent verification* of the *financial state* of [SJB]" (emphasis added).

The terms, "*concrete evidence*", "*independent verification*", or "*financial state*" cannot be found in any of the public documents for the RBE, these new terms are different in meaning compared to the terms used in the original requirement. Originally, terms such as "*financially viable*", "*financial qualifications*", or "*financial capability*" were used.

If the new terms had originally been used in the written instructions from the Commission or used in conversations with Commission staff, there is little doubt that SJB would have submitted a different set of alternative information with its Waiver Request, including, at a minimum, an audited balance sheet to show its *financial state* during the term of its existence.

#### **IV. SJB QUICKLY ADAPTED TO FOLLOW THE NEW RULES AND HAS FILED ITS AUDITED FINANCIAL STATEMENTS IN A TIMELY MANNER**

After the release of the Order and understanding that the rules for newly-formed entities had changed, SJB started the process to prepare audited financial statements to provide the Bureau *concrete evidence* with *independent verification* to show the *financial state* of SJB. On February 27, 2015, SJB submitted in its Form 5620 application audited financial statements dating back to its inception, enabling the Bureau to proceed, without causing any delay to the Bureau conducting the rural broadband experiments, in performing its review to ensure SJB meets expectations for financial capability. Throughout the RBE Application process, SJB has adapted and done everything possible to comply with the rules as they changed. It would be impossible for SJB to do any more than it already has to comply with the rules. Thus, SJB is now in compliance with the new rules as have been given in the Order. If in the future any new rules are put forth by the Bureau, SJB is wholly committed to strictly comply with those new rules.

**V. SJB IS TECHNICALLY AND FINANCIALLY CAPABLE TO SUCCESSFULLY DEPLOY ITS PROPOSED BID**

SJB was specifically formed by Mr. Donnell to participate in the Connect America Fund and build a network to service 20,439 homes and businesses in 2,585 “unserved” census blocks via a network of 45 new towers in the rural San Joaquin Valley, California.

Mr. Donnell served as the Western Region President of PageNet and the CEO of Cellular One where he recruited management teams to design, construct, and operate wireless communications networks across 12 States in the western region of the United States. From his rich network of experienced professionals, Mr. Donnell brought together the financial investments, and the engineering and operational talent necessary to successfully build and operate this new broadband and voice network designed specifically to service these Unserved Blocks. This team of industry professionals have a rich history of industry record growth and operating performance levels.

Even though SJB is a newly-formed entity, because of the financial and technical resources behind it, it is fully capable to fulfill the commitment to the Commission to build the network, to provide comparable voice and broadband services at comparable rates to those people living and working within the Unserved Blocks, and to provide these services over the decades to follow.

**VI. AS STEWARDS OF PUBLIC FUNDING IT IS THE DUTY OF THE BUREAU TO AWARD THE MOST COST-EFFECTIVE BIDS WHICH WILL FURTHER THE PUBLIC INTEREST**

As stewards of public interest, the Bureau was incentivised to encourage more participation in the rural broadband experiments as this increased the competition among bidders and in turn produced many more cost-effective bids for the benefit of the public. Knowing that

startups would not have three consecutive years of financial statements available, the Bureau instructed startups to seek waivers of the above mentioned requirement.

In the light that SJB's performance in serving the public interest will be insured by its LOC from an FDIC insured Top 100 largest U.S. bank,<sup>9</sup> accepting SJB's more cost-effective bids over the less efficient "next-in-line"<sup>10</sup> bids serves the public interest as this is a more efficient use of the public's funds. Good stewards of public funding would instead accept the most cost-effective bids rather than dismissing them based on strict adherence to a rule not designed to evaluate the public interest in employing a newly formed entity when there is a good cause to waive the requirement that was designed to evaluate a different set of entities from that of SJB. The Commission has stated that "LOCs are an effective means of securing our financial commitment to provide Connect America support."<sup>11</sup> The LOC ensures that the public funds will not go wasted and satisfies the spirit of the rule by allowing the Commission to have verified, professional assurance of the ability of SJB to fulfill its obligations. Thus, it is better to accept the most cost-effective bids over less efficient next-in-line bids as there is little to no risk that the funds will go wasted by accepting the more cost-effective bids from SJB, a newly-formed entity that has secured a solid LOC.

Strict adherence to a rule designed to evaluate entities that have operated for at least three years defeats the purpose and intent of the rules, which is to provide the Commission with the information necessary to evaluate *all* potential entities who can best serve the public interest. Newly-formed entities may be the best candidates to serve the public interest, as reflected by the

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<sup>9</sup> Rural Broadband Experiments Order at ¶59.

<sup>10</sup> Order at II. Discussion - ¶5.

<sup>11</sup> Rural Broadband Experiments Order at ¶56.

provisional acceptances already granted, and it would defeat the clear public policy of the rules to require that a viable and competitive entity produce records that simply do not apply to the Commission's evaluation of such entity. Thus, SJB's request for waiver should be granted so that SJB's application can be determined on the merits, as opposed to being denied based on a rule designed for a different business scenario.

## **VII. THE BUREAU ERRED IN PARTS OF THE ORDER**

The Bureau erred in its Order when it stated that "All bidders have been on notice since the release of the *Rural Broadband Experiments Order* in July 2014 that the Commission required provisionally selected bidders to provide three consecutive years of audited financial statements", as this was an impossible feat for newly-formed entities, and the Commission had made it clear that it was expecting waivers of this "requirement" for newly-formed entities that would be granted as appropriate waiver applications were filed.

The Bureau also erred in its Order when it stated that "The FAQ merely was intended to inform entities not familiar with Commission rules of their procedural options", as the question in the FAQ specifically addressed whether or not newly-formed entities were welcome to participate in the RBE and how a newly-formed entity should handle what would otherwise be an impossible feat for it as a startup.

## **CONCLUSION**

If it is the intention of the Commission to categorically preclude newly-formed entities from participating in the rural broadband experiments and the upcoming Phase II of the Connect America Fund, then the Bureau should plainly make this statement and deny this petition.

However, it is striking that the Commission's *Technology Transition Order*<sup>12</sup> opens the background section with a story highlighting that "America's first great national network was the railroad", a great national network that, under the order of one of America's great presidents, Abraham Lincoln, was built by none other than two *newly-formed* companies.<sup>13</sup> So, it is the belief of SJB that the Commission does not intend to categorically preclude the participation of newly-formed entities; and so, for the reasons discussed above and for good cause shown, the Bureau should reconsider its earlier denial and grant SJB's Waiver Request and reinstate SJB for further consideration of rural broadband experiments support.

Respectfully submitted,

**Michael D. Donnell d/b/a SAN JOAQUIN  
BROADBAND**

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<sup>12</sup> *Technology Transitions et al., Order et al.*, 29 FCC Rcd 1437 (2014) ("Technology Transitions Order").

<sup>13</sup> See Executive Order of Abraham Lincoln Fixing the Point of Commencement of the Union Pacific Railroad at Council Bluffs, Iowa, March 7, 1864 (38th Congress, 1st Session Senate Ex. Doc. No. 27); see also, e.g., Pacific Railroad Act of July 1, 1862, § 2; Pacific Railroad Act of July 2, 1864, § 18 (setting aside public right of way).