

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

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

Adopted: January 30, 2015

Released: January 30, 2015

By the Deputy Chief, Wireline Competition Bureau:

ORDER

1. In this Order, we deny petitions filed by AirNorth Communications, Inc.; Agile Network Builders, LLC; Brainstorm Internet Inc.; Chaffee County Telecom, LLC; Cricelli, Inc.; Crystal Broadband Networks, Inc.; Declaration Networks Group; De Novo Group; Donnell, Michael D. (d/b/a San Joaquin Broadband); Giant Communications, Inc.; Last Mile Broadband; Mercury Wireless Inc.; Rural Broadband Services Corporation, Inc.; Tower Communications LLC; and Worldcall Interconnect, Inc. (collectively, the Petitioners) for a waiver of the rural broadband experiments requirement to file three years of audited financial statements. We also remove one additional entity—Lennon Telephone Company (Lennon)—from further consideration for rural broadband experiments support for failing to

1 Petition of AirNorth Communications, Inc. for Waiver of Audited Financial Statements, WC Docket No. 10-90 (filed Dec. 19, 2014) (AirNorth Petition); Letter from Stephen E. Coran, Counsel for Agile Network Builders, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Dec. 19, 2014) (Agile Financial Petition); Petition of Brainstorm Internet for Waiver of Requirement to Provide Three Years of Audited Financial Statements for the Post Selection Review, WC Docket No. 10-90 (filed Dec. 18, 2014) (Brainstorm Petition); Waiver Request of Chaffee County Telecom, LLC, WC Docket No. 10-90 (filed Dec. 19, 2014); Letter from Stephen E. Coran, Counsel for Cricelli, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Dec. 19, 2014) (Cricelli Financial Petition); Petition for Waiver of Crystal Broadband Networks, WC Docket No. 10-90 (filed Dec. 17, 2014); Petition of Declaration Networks Group, Inc. for Waiver of Requirement to Provide Three Years of Audited Financial Statements for the Post Selection Review, WC Docket No. 10-90 (filed Dec. 11, 2014); Letter from Yahel Ben-David, President, De Novo Group, to Federal Communications Commission, WC Docket No. 10-90 (filed Dec. 16, 2014); 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) (Donnell Petition); Last Mile Broadband LLC Request for Waiver, WC Docket Nos. 10-90, 14-58 (filed Dec. 19, 2014) (Last Mile Petition); Petition of Mercury Wireless, Inc. for Waiver of Requirement to Provide Three Years of Audited Financial Statements by December 19, 2014 for Rural Broadband Experiments Post-Selection Review, WC Docket No. 10-90 (filed Dec. 19, 2014) (Mercury Wireless Petition); Rural Broadband Services Corporation, Inc. Request for Waiver of Requirement for Three Years of Audited Financial Statements, WC Docket No. 10-90 (filed Dec. 18, 2014) (RBSC Petition); Petition of Tower Communications LLC for Waiver of Requirement to Provide Three Years of Audited Financial Statements for the Post Selection Review, WC Docket No. 10-90 (filed Dec. 19, 2014); Petition for Waiver of Worldcall Interconnect Inc., WC Docket No. 10-90 (filed Dec. 16, 2014). See also Wireline Competition Bureau Announces Availability of Additional Funding for Rural Broadband Experiments; Seeks Comment on Waiver Petitions of Provisionally Selected Bidders, WC Docket Nos. 10-90, 14-259, Public Notice, DA 14-1889, Attach. B (Wireline Comp. Bur. rel. Dec. 23, 2014) (Rural Broadband Experiments Waivers Public Notice).

file the required financial information and not submitting a waiver request. We also deny petitions filed by Agile Network Builders, LLC, Cricelli, Inc., and Last Mile Broadband for a waiver of the rural broadband experiments requirement that their network diagram be certified by a professional engineer.² Because we do not find good cause to waive the requirements established by the Commission, we remove these entities from further consideration for rural broadband experiments support. Collectively, these applicants sought almost \$55 million in funding, which will now be available to other bidders. We will announce the provisionally selected next-in-line bidders in a future Public Notice. Finally, we deny the request filed by the Alliance of Rural Broadband Applicants (Alliance) to delay the February 3rd deadline for provisionally selected bidders to file their letter of credit (LOC) commitment letters.³

I. BACKGROUND

2. In the *Rural Broadband Experiments Order*, the Commission required provisionally selected bidders to submit certain information and materials by a specified deadline that would enable the Wireline Competition Bureau (Bureau) to undertake a financial and technical review of the selected bidders before authorizing them to receive support. Specifically, entities were required to provide the most recent three consecutive years of audited financial statements, including balance sheets, net income, and cash flow, and to submit a description of the technology and system design used to deliver voice and broadband service, including a network diagram certified by a professional engineer within ten days of Public Notice of the provisionally selected bidders.⁴ The Commission reasoned that these specific requirements would enable the Bureau to evaluate the financial and technical qualifications of each selected bidder.⁵

3. On December 5, 2014, the Bureau released a list of 37 entities provisionally selected as winning bidders for rural broadband experiments support.⁶ As part of the framework established by the Commission to be authorized to receive such support, each of these entities was required to submit the required financial and technical information by December 19, 2014.⁷ Six provisionally selected bidders defaulted by either withdrawing from consideration from support or failing to submit the required information by the deadline.⁸ Of the remaining 31 provisionally selected bidders, 15 submitted the financial and technical information required by the Commission, while 15 entities filed petitions requesting waiver of the requirement to provide three consecutive years of audited financial statements.⁹ Three of those 15 entities that sought a waiver of the financial information filing requirement also

² Letter from Stephen E. Coran, Counsel for Agile Network Builders, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Dec. 19, 2014) (Agile Technical Petition); Letter from Stephen E. Coran, Counsel for Cricelli, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Dec. 19, 2014) (Cricelli Technical Petition); Last Mile Petition at 3.

³ See Petition for Waiver of the Alliance of Rural Broadband Applicants, WC Docket Nos. 10-90, 14-58 (filed Jan. 27, 2015) (Alliance Petition).

⁴ See *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, 8787-88, para. 54 (2014) (*Rural Broadband Experiments Order*).

⁵ See *id.* at 8780-81, para. 31.

⁶ See *Wireline Competition Bureau Announces Entities Provisionally Selected for Rural Broadband Experiments; Sets Deadlines for Submission of Additional Information*, WC Docket No. 10-90, Public Notice, DA 14-1772 (Wireline Comp. Bur. rel. Dec. 5, 2014).

⁷ See *id.*

⁸ See *Rural Broadband Experiments Waivers Public Notice* at Attach. A.

⁹ See *id.* at Attach. B.

requested a waiver of the requirement that their network diagram be certified by a professional engineer. Finally, Lennon did not file three years of audited financial statements and did not request a waiver.

4. On January 27, 2015, the Alliance filed a petition for waiver of the Commission's letter of credit requirements for provisionally selected bidders.¹⁰ In addition to seeking specific changes to these requirements, the Alliance requested that the Bureau suspend the February 3rd deadline for provisionally selected bidders to submit their LOC commitment letters.¹¹

II. DISCUSSION

5. We conclude that the standards for waiver have not been met.¹² While some Petitioners seek a waiver to have more time to fulfill the requirements established by the Commission, and other Petitioners seek a waiver because they are unable to meet the requirements for the experiments, we conclude that the public interest would not be served by granting these waivers. We conclude that strict enforcement of the deadlines and filing requirements adopted by the Commission is appropriate given the accelerated time frame for the rural broadband experiments.¹³ 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.¹⁴

¹⁰ See Alliance Petition at 10-12.

¹¹ See *id.* at 12.

¹² 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166. "[D]eadlines can only be waived under 'unusual or compelling circumstances.'" *NetworkIP, LLC v. FCC*, 548 F.3d 116, 126 (D.C. Cir. 2008) (citation omitted).

¹³ We note that the Commission has strictly enforced filing deadlines in other contexts. See, e.g., *Vanessa Cintron, Noble Ventures, Inc., On Request for Inspection of Records*, FOIA Control No. 2014-282, Memorandum Opinion and Order (2014) (dismissing an application for review that was filed three days late and noting "[w]hile losing the right of appeal when a deadline is missed by a brief time 'may seem unduly harsh . . . short of exceptional circumstances (which are not present here), courts have generally respected statutory and regulatory deadlines"); *Totally Jesus Network, Inc. Application for a New NCE FM Station at Gold Beach, Oregon, et al.*, File No. BNPED-20071018AON, Memorandum Opinion and Order, 29 FCC Rcd 6414 (2014) (affirming a decision to dismiss an application for a new noncommercial FM station after the applicant experienced technical difficulties and filed nine days past the filing deadline).

¹⁴ See *Connect America Fund; ETC Annual Reports and Certifications; Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, WC Docket Nos. 10-90, 14-58, 14-192, Report and Order, FCC 14-190, paras. 8 (stating expectation that the Bureau will finalize the list of census blocks for the offer of support in early 2015), 12 (indicating that rural broadband experiments will help inform decisions regarding the design of the Phase II auction), 84 (emphasizing intention not to delay offer of model-based support) (rel. Dec. 18, 2014) (*December CAF Order*); *Rural Broadband Experiments Order*, 29 FCC Rcd at 8775-76, para. 14.

6. 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.¹⁵ 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.¹⁶ 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

7. Several Petitioners submitted unaudited financial statements as alternative evidence of their financial capability.¹⁸ Though unaudited financial statements provide some detail regarding the financial state of an entity, they do not provide the same level of assurance as audited financial statements. By adopting the requirement to submit three years of audited financial statements, the Commission ensured that the financial picture of the selected bidders had been audited by a neutral third party – an independent certified public accountant that is subject to professional standards when reaching a conclusion whether the financial statements prepared by management are in accordance with Generally Accepted Accounting Principles and free from material misstatement. 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.¹⁹

8. Similarly, other Petitioners submitted financial materials such as tax returns or financial projections that provide no independent verification of the financial state of these entities.²⁰ Again, for the same reasons, we conclude that the public interest would not be served by waiving the Commission’s financial submission requirements and engaging in a more protracted effort to determine whether the Petitioners have successfully demonstrated their financial capability. Such alternative submissions provide even less assurance to the Commission regarding the financial situation of the provisionally selected bidder than the unaudited financial statements. Finally, we note that that Lennon did not comply with the Commission’s financial review requirement to submit three years of financial statements certified by an independent auditor and failed even to request a waiver. As the Commission recently stated, it expects all recipients of funding, “even those new to the Commission’s processes or with small

¹⁵ *Rural Broadband Experiments Order*, 29 FCC Rcd at 8771-72, para. 6. *See also* Reply Comments of the Minnesota Telecom Alliance Opposing Waiver Requests, WC Docket Nos. 10-90, 14-259, at 3-4 (filed Jan. 13, 2015) (MTA Reply Comments).

¹⁶ Comments of Midwest Energy Cooperative, WC Docket Nos. 10-90, 14-259, at 2 (filed Jan 6, 2015) (Midwest Comments); Comments of the United States Telecom Association, WC Docket Nos. 10-90, 14-259, at 2 (filed Jan. 6, 2015) (USTelecom Comments); MTA Reply Comments at 4.

¹⁷ Comments of NTCA-The Rural Broadband Association on Waiver Petitions of Provisionally Selected Bidders, WC Docket Nos. 10-90, 14-259, at 2-3 (filed Jan 6, 2015).

¹⁸ *See, e.g.*, Airnorth Petition at 2-3; Agile Financial Petition, Attach. at 2; Brainstorm Petition at 1; Mercury Wireless Petition at 5.

¹⁹ MTA Reply Comments at 5; Reply Comments of the Utilities Telecom Council, WC Docket Nos. 10-90, 14-259, at 2,4 (filed Jan. 13, 2015) (UTC Reply Comments).

²⁰ *See, e.g.*, Cricelli Financial Petition, Attach. at 2; Donnell Petition, Attach. at 2-3; Last Mile Petition at 2-4; RBSC Petition at 2.

staffs, to implement appropriate procedures to ensure compliance with the Commission's filing deadlines and other regulatory requirements."²¹ Because we conclude that Lennon and the Petitioners have failed to meet the Commission's requirements for financial submissions, we remove them from any further consideration for such support. For the same reasons we are not granting waivers to any of the current provisionally selected bidders, we also decline to grant the requests for waiver of those next-in-line bidders that sought waivers of the financial or technical information requirements.

9. We are not persuaded by arguments that the filing deadline of 10 business days following public notification of provisionally selected bidders was insufficient time for these bidders to obtain audited financial statements.²² 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 within 10 business days of public notification of their selection.²³ Any potential rural broadband experiments applicant should have factored this requirement, as well as all other rural broadband experiments requirements and obligations, into their initial decision to bid for support.²⁴ We similarly are not convinced that we should provide additional time to certain entities to produce audited financial statements.²⁵ All provisionally selected bidders had ample time—over five months from the release of the *Rural Broadband Experiments Order*—to prepare for this requirement.²⁶ Moreover, the Commission recently affirmed the same 10 business day timeframe for entities interested in continuing to be considered for rural broadband experiments support in the event any of the provisionally selected bidders defaulted,²⁷ and numerous other applicants were able to meet that deadline to submit the required information. Effectively extending the deadline for certain provisionally selected bidders to provide audited financial statements is unfair to those entities that took the necessary steps to comply with the requirement by the deadline.

10. Nor are we persuaded that we should suspend the deadline for securing a commitment for a letter of credit. Doing so would prevent the Bureau from identifying a new group of provisionally selected bidders before it finalizes the list of census blocks that will be subject to the offer of model-based support. That, in turn, would be prejudicial to those next-in-line bidders that submitted the requisite financial and technical information by the January 6th deadline established by the Commission.

²¹ See *December CAF Order* at para. 138.

²² See Mercury Wireless Petition at 4-5; Reply Comments of Worldcall Interconnect, Inc., WC Docket Nos. 10-90, 14-259, at 10-11 (filed Jan. 13, 2015) (Worldcall Reply Comments).

²³ *Rural Broadband Experiments Order*, 29 FCC Rcd at 8787-88, para. 54. See also Midwest Comments at 2; MTA Reply Comments at 4-5; Letter from Andrea E. Welter, Counsel to Skybeam, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 14-259 at 1-2 (filed Jan. 6, 2015) (Skybeam Comments); USTelecom Comments at 3.

²⁴ See Skybeam Comments at 2-3. The fact that the Bureau indicated prior to the application deadline in an FAQ on the Commission's website that parties unable to produce three consecutive years of audited financial statements could seek a waiver of this requirement in no way undermines our decision today to require strict adherence to the Commission's rules for the experiments and deny all of the waiver requests. See, e.g., *Mary V. Harris Foundation v. FCC* (13-1304), slip op. at 14 (D.C. Cir. Jan. 20, 2015) ("An agency does not abuse its discretion by applying a bright-line rule consistently in order both to preserve incentives for compliance and to realize the benefits of easy administration that the rule was designed to achieve."). The FAQ merely was intended to inform entities not familiar with Commission rules of their procedural options.

²⁵ Comments of American Cable Association, WC Docket Nos. 10-90, 14-259, at 2 (filed Jan. 6, 2015); Reply Comments of Mercury Wireless, Inc., WC Docket Nos. 10-90, 14-259, at 5-7 (filed Jan. 13, 2015); Worldcall Reply Comments at 3-9.

²⁶ USTelecom Comments at 3; UTC Reply Comments at 2.

²⁷ See *December CAF Order* at para. 83.

11. We also do not agree with some commenters that an entity's ability to obtain a LOC commitment letter demonstrates its financial capability.²⁸ The Commission expressly indicated that the Bureau's financial review and LOC requirement are two distinct prerequisites for provisionally selected bidders to fulfill before being authorized to receive support. The Commission not only set two separate deadlines for bidders to submit this information,²⁹ but also stated that "[o]nce the Bureau has determined that the entity is financially and technically qualified to receive experiment support *and* that the LOC commitment letter is sufficient, it will release a public notice indicating that the entity is ready to be authorized to receive support."³⁰ It also noted that Commission staff would "perform a review to ensure that the selected applicants *meet our expectations* for technical and financial capability to conduct an experiment before any support is provided."³¹ Therefore, though a bank may examine an entity's financial standing before determining whether to issue a LOC, the Commission intended for the Bureau to undertake its own independent review to determine an entity's financial capability to build out a network and provide universal service to the consumers in the area in which it would receive support.

12. Finally, we deny petitions filed by Agile Network Builders, LLC (Agile), Cricelli, Inc. (Cricelli), and Last Mile Broadband (Last Mile) for a waiver of the rural broadband experiments technical requirement to have their network diagrams certified by a professional engineer. Similar to the audited financials requirement, the purpose of having an entity's network diagrams certified by a professional engineer was to have an educated engineer verify that the entity's proposed network would be able to fulfill the service obligations to which it had committed. Agile and Cricelli requested a waiver due to an inability to enlist the services of a professional engineer familiar with either their specific technology or terrain issues.³² Conversely, Last Mile requested an extension of time due to the "shortened time frame (10 days) to submit the first round of documentation" and the unavailability of its selected professional engineer.³³

13. We do not find any compelling reason to grant these requests. With regard to Agile and Cricelli, we note that the vast majority of provisionally selected bidders—28 entities proposing to build different types of networks in almost 20 different states—were able to obtain certification of their network diagrams by a professional engineer. The inability of two bidders to obtain such a certification does not provide confidence that the proposed network design is sufficient to provide the requisite service in the areas for which Agile and Cricelli would receive support. We therefore deny these waiver requests. Similarly, we deny Last Mile's request for an extension of time. As explained above, provisionally selected bidders have been on notice since the release of the *Rural Broadband Experiments Order* that the Commission would require certain technical information to be submitted within 10 business days of public notification of their selection. Moreover, the fact that Last Mile's selected professional engineer was unavailable to make the certification by the deadline is not persuasive grounds for a waiver. Last Mile had ample time in the five months between the release of the *Rural Broadband Experiments Order* and the deadline for submission of its required technical information to secure the services of an engineer that could certify its proposed network diagrams. Again, we conclude that strict adherence to the

²⁸ See Cricelli Financial Petition, Attach. at 2; Reply Comments of Tower Communications LLC, WC Docket Nos. 10-90, 14-259, at 2 (filed Jan 13, 2015); Response of Michael D. Donnell d/b/a San Joaquin Broadband to Comments on Waiver Petitions of Provisionally Selected Bidders, WC Docket Nos. 10-90, 14-259, at 5-6 (filed Jan. 13, 2015)

²⁹ *Rural Broadband Experiments Order*, 29 FCC Rcd at 8787-88, para. 54.

³⁰ *Id.* at 8787, para. 52 (emphasis added).

³¹ *Id.* (emphasis added).

³² Agile Technical Petition, Attach. at 1; Cricelli Technical Petition, Attach. at 1.

³³ Last Mile Petition at 3.

deadlines adopted by the Commission for these rural broadband experiments would better serve the public interest.

III. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, that this Order IS ADOPTED.

15. IT IS FURTHER ORDERED that the petitions for waiver of the rural broadband experiments financial review requirements, which requires provisionally selected bidders to provide the most recent three consecutive years of audited financial statements, filed by AirNorth Communications, Inc.; Agile Network Builders, LLC; Brainstorm Internet Inc.; Chaffee County Telecom, LLC; Cricelli, Inc.; Crystal Broadband Networks, Inc.; Declaration Networks Group; De Novo Group; Donnell, Michael D. (d/b/a San Joaquin Broadband); Giant Communications, Inc.; Last Mile Broadband; Mercury Wireless Inc.; Rural Broadband Services Corporation, Inc.; Tower Communications LLC; and Worldcall Interconnect, Inc., ARE DENIED as described herein.

16. IT IS FURTHER ORDERED that the petitions for waiver of the rural broadband experiments technical review requirements, which requires provisionally selected bidders to submit a description of the technology and system design used to deliver voice and broadband service, including a network diagram certified by a professional engineer, filed by Agile Network Builders, LLC; Cricelli, Inc.; and Last Mile Broadband, ARE DENIED as described herein.

17. IT IS FURTHER ORDERED that the petition for waiver filed by the Alliance of Rural Broadband Applicants, IS DENIED IN PART as described herein.

18. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Carol Matthey
Deputy Bureau Chief
Wireline Competition Bureau