

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
On Its Own Motion)	
)	Docket No. 06-0187
Grant awards from Digital Divide)	
Elimination Infrastructure Fund.)	

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S
REPLY BRIEF REGARDING PROCEDURES TO BE EMPLOYED

NOW COMES the Staff of the Illinois Commerce Commission (hereafter “the Staff”) and, in reply to Briefs and other pleadings submitted pursuant to the Administrative Law Judge’s order dated April 12, 2006, directing the parties to submit briefs and legal argument regarding the procedures to be employed in this proceeding, states as follows:

I. Parties’ Comments

A. ROC-Net Holdings, Inc.

ROC-Net Holdings, Inc. (hereafter “ROC-Net”) argues that this matter must proceed subject to the Illinois Procurement Code, 30 ILCS 500/1-1, *et seq.* ROC-Net Brief at 1-3. This, according to ROC-Net, means that other parties are not entitled to discovery of ROC-Net’s (or other Applicants’) proposals, and therefore cannot in any practical way usefully participate in any proceeding or part of a proceeding that deals with the merits of any proposal other than its own. Id. at 3. ROC-Net argues that, to the extent that the Commission determines that an applicant is indeed entitled to review any portion of any other’s application, it

should be only for the purpose of supporting its own, and only then do address deficiencies identified in the Staff Report. Id. at 5.

ROC-Net further states that the intervenors in this proceeding that have not themselves filed applications – specifically, the Illinois Telecommunications Association (“ITA”) and the Illinois Bell Telephone Company (“AT&T Illinois”) – have a very limited interest in this proceeding, and are moreover potential competitors to the eligible entities that have submitted proposal for funding. ROC-Net Brief at 6. ROC-Net argues that these parties, while they might be permitted to monitor the proceeding, have no authority or right to submit evidence, and should not be permitted to do so. Id. To the extent that the Commission disagrees with this view, ROC-Net argues that non-applicant intervenors should be permitted to comment on what areas are “eligible areas” within the meaning of Section 13-301.3, and nothing more. Id. at 7. ROC-Net again asserts that non-applicant intervenors should not be permitted to comment on individual applications, such as technical, managerial or financial resources and abilities. Id.

B. Delta Communication, LLC, d/b/a Clearwave Communications, LLC

Delta Communication, LLC, d/b/a Clearwave Communications, LLC (hereafter “Delta”) advances arguments similar to those of ROC-Net: specifically that the Illinois Procurement Code applies to this proceeding, and prohibits non-applicants from taking part in the proceeding. Delta Brief at 1-2. Delta urges the ALJ to issue a Proposed Order based on the Staff Report. Id. at 2.

C. Cities of Princeton and Rock Falls

The City of Princeton and the City of Rock Falls (hereafter “the Cities”) submitted a joint response. See Joint Response. The Cities have no objection to this proceeding being conducted as a paper hearing. Id., ¶1. The Cities state that, in arguing in favor of their own proposals, they may be compelled to refer to the proposals of others. Id., ¶2. The Cities assert that “reasonable restrictions” should be placed on the participation of non-applicant intervenors, as these parties are potential competitors with applicants. Id., ¶3.

D. Verizon Avenue Corporation

Verizon Avenue Corporation (“Verizon Avenue”) asserts that due process requires it to have access to all record material, including the Staff Report in un-redacted form and all applications. Verizon Comments at 2. It suggests that this is required to determine whether the Staff appropriately applied the statutory criteria to each application in an evenhanded way. Id. It further suggests that the statute and rules governing this proceeding do not preclude consideration of such material. Id. at 3

Verizon Avenue supports paper hearings, to the extent it has access to all proposals and the un-redacted Staff Report. Id. at 4-5. Should it not receive such information, Verizon Avenue asserts that it would be deprived of due process were it not permitted to cross examine witnesses. Id. at 5.

E. Heartland Communications, Inc. / Aero Communications, LLC / Mt. Vernon.net Inc.

Heartland Communications, Inc., Aero Communications, LLC, and Mt. Vernon.net Inc. ("Aero/Heartland")¹ assert that the Commission should summarily enter an order awarding grants according to the tenor of the Staff Report. Brief in Response to Motions to Intervene at 2, *et seq.* Aero/Heartland asserts that grant proposals contain information that is competitively sensitive, and no intervenor, whether an applicant or otherwise, has any right to review another applicant's proposal in light of the likelihood that such intervenors are in competition with applicants. Id. at 1, 5-6. Aero/Heartland asserts that several intervenors have sought to participate in this proceeding chiefly to frustrate or delay the awarding of grants, and contend that permitting such intervention, and holding evidentiary hearings, is unnecessary and contrary to the public interest. Id. at 5-6.

F. AT&T Illinois

AT&T filed its Comments on April 12, 2006 in accord with the pre-hearing briefing schedule set by the ALJ. See ST&T Comments. On the date for filing Replies to briefs on the procedure the Commission should employ in this docket, AT&T filed its Notice of Withdrawal from the proceeding. Consequently, the ALJ and this Commission should restrict their analysis to the arguments of those parties remaining.

¹ Aero and Heartland describe themselves, prematurely, as "Recipients".

G. Illinois Telecommunications Association

The ITA asserts that the Commission's Request for Grant Proposal (RFGP) clearly contemplates contested hearings, with cross-examination of witnesses. ITA Response at 1. The ITA states, quite forthrightly, that it "intends to review the unredacted versions of the various applicants' RFGs and, where appropriate, to adduce evidence that contradicts matters contained in an RFG." Id. The ITA contends that its role in this proceeding is to "help[] to insure the integrity of the fact finding process[.]" Id. The ITA provides its assurance that it does not intend to advance arguments or evidence in support of the assertion that Section 13-301.3 constitutes bad public policy. Id. at 2.

II. Staff Response

A. Application of the Illinois Procurement Act

ROC-Net and Delta both contend that this matter is fully subject to the Illinois Procurement Code. The Recipients appear to advance a similar line of argument.

The Procurement Code, however, applies to only the most limited extent. As Staff noted in its Initial Brief, Staff Initial Brief at 10-11, this assertion is largely incorrect. In fact, the Procurement Code specifically provides that it "shall not apply to ... [g]rants, except for the filing requirements of Section 20-80 [which requires that grants be filed with the Comptroller's office]." 30 ILCS 500/1-10(b)(2). Accordingly, the Procurement Code cannot be invoked as a specific bar to some form of contested proceeding in this matter.

Staff does not suggest that the Procurement Code cannot provide certain guidance regarding this matter. Indeed, in its Initial Brief in response to the ALJ's order, the Staff demonstrates that the Procurement Code provides significant guidance regarding what process is in fact due to the parties in this proceeding, Staff Brief at 11-12, and realleges and reincorporates those arguments here. That said, arguments premised on the specific application of the Procurement Code to this proceeding must fail.

B. Due Process Questions

Several parties contend that, should they not be permitted full discovery and/or the right to cross-examine witnesses and otherwise supplement the record in this proceeding, they will be improperly, and, one presumes, unconstitutionally deprived of procedural due process.

As Staff demonstrated in its Brief, this is very simply not the case. Without reiterating these arguments in great detail, Staff observes that the level of due process appropriate in an administrative proceeding is directly related to the property right implicated in that proceeding. Staff Brief at 7, *et seq.* Here, the most significant property interest is the right to potentially receive grant funding pursuant to Section 13-301.3. ITA expresses no interest other than a general interest in the enforcement of the law in a fair and unbiased way. In other words, no party has articulated, chiefly because no party possesses, any very compelling or salient property interest. To summarize, the process articulated by

Staff is at least adequate, and probably even somewhat extravagant for purposes of this proceeding.

On the other hand, several parties have expressed the belief – based, as noted above, upon the mistaken notion that the Procurement Code applies in full to this proceeding – that the Commission can, should, and very nearly must, enter an Order approving grants to those applicants whose proposals the Staff has recommended funding. These parties attempt, improperly in the Staff’s view, to argue due process out of existence. There must, in this proceeding, be some opportunity for parties to be heard. The Staff proposes a solution that strikes a proper balance, and it should be adopted.

C. Specific Proposals

The Staff notes that there appears to be, with the exception of ITA, a general consensus that this matter can proceed as a “paper” proceeding, without live witness testimony. As the Staff understands its position, the ITA insists on live testimony and cross examination.

Even if this were a meritorious position in the context of this proceeding – and, as the Staff has demonstrated, it is not – the ITA would be entirely the wrong party to assert it. The ITA’s property interest in this proceeding borders upon non-existent. Accordingly, its assertions regarding what process is due it should be discounted.

ROC-Net proposes, in the alternative, that non-applicant intervenors be permitted to comment only upon the issue of what constitutes an “eligible area”.

This has a certain appeal, in light of the fact that the non-applicant intervenors might be the parties with the best knowledge regarding this question. That said, the ALJ's entry of a protective order may have subsumed this question.

III. Conclusion

The ALJ and, as needed, Commission should adopt the Staff's proposal. It provides due process to the parties in a unique species of proceeding, while at the same time reducing costs for all parties, and making it possible to expeditiously award grants as intended by the General Assembly.

WHEREFORE, for all of the reasons articulated above, the Staff of the Illinois Commerce Commission hereby requests that its recommendations to the Commission be adopted.

Respectfully submitted,

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April 26, 2006

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