

**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)	

VERIZON AVENUE CORPORATION’S REPLY COMMENTS ON PROCESS

Pursuant to the schedule set by the Administrative Law Judge (“ALJ”) at the April 12, 2006 Status Hearing (“Status”), Verizon Avenue Corporation (“Verizon”), by and through its attorneys, hereby submits its reply comments regarding the appropriate scope and nature of this proceeding.

I. Delta Communications, LLC d/b/a Clearwave Communications LLC (“Delta”)

First, Delta incorrectly asserts that Verizon North Inc. and Verizon South Inc. “filed petitions for leave to intervene which were granted.”¹ While Verizon North Inc. and Verizon South Inc. filed an appearance in this proceeding so that they would be served with pleadings, they have not filed petitions for leave to intervene and are not parties to this proceeding.

Verizon Avenue Corporation is a party to this proceeding. Delta further asserts that “[n]either AT&T, ITA or Verizon submitted an application for a grant from the DDEIF. As such, they have no standing to participate in the award process.” (Delta Comments at 1). Again, Verizon North Inc. and Verizon South Inc. did not submit Digital Divide Elimination Infrastructure Fund (“DDEIF”) grant applications, but Verizon Avenue Corporation *was* a DDEIF grant applicant,² and plainly has “standing to challenge the grant process” even under Delta’s limited

¹ See April 19, 2006 “Comments of Delta Communications, LLC, d/b/a Clearwave Communications, LLC” (“Delta Comments”) at 1.

interpretation of what should be deemed permissible.

Next, the Commission should reject Delta's suggestion that no hearings of any kind be held in this proceeding,³ for the reasons fully set forth at pages 4-6 of Verizon's April 19, 2006 "Verizon Avenue Corporation's Process Comments" ("Verizon Comments"). As noted therein, the DDEIF Request for Grant Proposals ("RGP") explicitly stated that hearings would be held in this matter. Verizon reiterates that it recommends a "paper hearing" process under 83 Ill. Admin. Code § 200.525 provided that certain conditions regarding use of the full record are met, and refers the Commission to pages 4-6 of the Verizon Comments for its discussion of those conditions.

While Delta apparently wishes to preclude any scrutiny of its DDEIF grant application and underlying factual assertions, the Commission must meet the requirements of 83 Ill. Admin. Code Part 759 and 220 ILCS 5/13-301.3 to fully consider the applicable grant criteria. Parties other than Delta have evidence relevant to this inquiry, and it would be error to foreclose them from presenting it in this proceeding.

II. Illinois Commerce Commission Staff ("Staff")

Verizon does not dispute Staff's recitation of various authorities describing the somewhat "relaxed" nature of due process in the administrative realm, nor does Verizon oppose a streamlined process. In this proceeding, Verizon itself has advocated for a streamlined process that eliminates many of the due process mechanisms typically available to parties in contested proceedings before the ICC. (*See generally* Verizon Comments). Verizon consequently does

² See the Illinois Commerce Commission's ("Commission") March 28, 2006 Telecommunications Division Staff Report ("Staff Report") at 10-12.

not object in the abstract to “streamlined procedures of the type recommended by Staff.” (Staff Brief at 9).

However, although Staff recommended a paper hearing process with a minimum of filings at the Status, Staff’s written comments recommended a live hearing (although without cross-examination). Staff’s written comments also proposed that the parties could submit post-hearing briefs, draft orders and briefs on exceptions in addition to comments on the Staff Report.⁴ This flurry of additional filings is directly contrary to Staff’s recommendation “[t]hat the matter proceed expeditiously,” (Staff Brief at 5), as well as Staff’s concerns about the costs of the DDEIF grant applicants’ participation in this proceeding (Staff Brief at 14).

Although Verizon has no objection to a single-round, verified comment process (*see* Verizon Comments at 5), it does object to permitting parties to supplement those verified comments through testimony at a live hearing without any opportunity for cross-examination. This does not constitute due process. As urged in the Verizon Comments, the Commission should use a paper-only hearing process that permits full use of the record. The Commission should preclude the parties from presenting any supplemental oral testimony if a “live” hearing is held.

Verizon also objects to the parties making filings beyond the submission of comments on the Staff Report and exceptions to the ALJ’s proposed order, as proposed in the Verizon comments. There is no need to bog the parties down with multiple rounds of filings in this proceeding, particularly given the desire to complete this case on an expedited basis. Staff’s

³ *See* Delta Comments at 2.

suggestion to authorize additional filings will not only delay this proceeding, but will significantly increase the costs of the parties' participation. As Staff itself has stated:

The Staff notes, again, that it is of the opinion that the costs to parties that result from additional due process requirements should be considered. A number of applicants have filed proposals seeking very modest sums, and others are small businesses, governmental, or quasi-governmental, entities. *The transaction costs associated with extended, contested hearings and the filing of numerous briefs and draft orders imposes costs upon such parties that detract significantly from the real value of the grants they might obtain, and might very well tax their resources. Indeed, future applicants may be deterred from submitting proposal. This is clearly not what the General Assembly intended.* (Staff Brief at 14-15; emphasis added).

Finally, Verizon notes that Staff, like Delta, has lumped Verizon North Inc. and Verizon South Inc. together with the non-applicant intervenors in this proceeding such as AT&T Illinois and the Illinois Telecommunications Association. (Staff Brief at 3). However, as noted above, Verizon North Inc. and Verizon South Inc. are not parties to this proceeding, but filed an appearance to ensure that they would be served with pleadings in this docket. Verizon Avenue Corporation, which *was* a DDEIF grant applicant, is a party to this proceeding.

Verizon urges the ALJ to reject Staff's recommendations and adopt those proposed by Verizon.

III. Roc-Net Holdings, LLC ("Roc-Net")

Roc-Net would limit the evaluation of its application to a bare minimum, under the guise of purported strict adherence to the governing statutes and the desire for expeditious resolution of this proceeding. While Verizon does not object conceptually to a streamlined process for this docket, it does object to Roc-Net's desire to prohibit all parties from discussing the full record in

⁴ See April 19, 2006 "Staff of the Illinois Commerce Commission's Initial Brief Regarding Procedures to Be

their comments.

First, the authorities cited by RocNet do not support its recommendations. For example, Roc-Net cites 220 ILCS 5/13-301.3(c) as grounds to limit other parties from addressing the record in this proceeding, including the DDEIF grant applications.⁵ However, the Digital Divide statute (220 ILCS 5/13-301.2 and 301.3) is not that limited. It not only explicitly requires the Commission to award grants “on the basis of the criteria established in the [Illinois Procurement Law; 30 ILCS 500 *et seq.*],” as Roc-Net notes, but also requires the Commission to consider various enumerated statutory factors, and to promulgate rules that will govern the Commission’s DDEIF grant award process. (220 ILCS 5/13-301.3(b)). The administrative rules adopted by the Commission require the examination of the statutory factors, “among other things” (83 Ill. Admin. Code § 759.230(a)), meaning that the Commission’s inquiry is not limited to an evaluation of the enumerated statutory factors, much less to a single party’s view of whether a particular application met them.

In other words, the Digital Divide statute is precisely the reason why this Commission must consider *all* evidence relevant to the mandatory factors that govern its evaluation of the DDEIF grant applications, rather than merely the information tendered by the applicants themselves solely on their own applications. Nothing in the Digital Divide statute authorizes the Commission to limit its review to information provided in an application and exclude other relevant data from its consideration. Indeed, given that both the statute and the Commission’s administrative rules are mandatory (directing that the Commission “shall” consider the statutory

Employed” (“Staff Brief”) at 5.

factors, “among other things”), Roc-Net has no basis to claim that the Commission is required to ignore relevant evidence simply because it is offered by a party other than the particular applicant at issue.

Second, Roc-Net’s misreading of the Illinois Procurement statute is similarly inapposite. Roc-Net focuses on the confidentiality provisions of the competitive selection section of the statute (30 ILCS 500/20-35), ignoring that this section – entitled “Discussions” – applies only when the purchasing entity conducts discussions with an offeror that has submitted a proposal in order to “determine the offeror’s qualifications for further consideration.” (30 ILCS 500/20-35(d)). In such instances, the purchasing agency cannot share the content of those private discussions with other bidders. The purpose of this restriction is to ensure that bids and information obtained in discussions between the purchasing entity and the bidder prior to the award of bids remains confidential during the bidding process, so that no bidder can benefit competitively from access to that information.⁶

This restriction is inapplicable here, where the “bidding process” is complete and the Staff Report has been published. The DDEIF grant applications were submitted long ago, and cannot be modified now. Moreover, Staff’s review of the applications is complete and its recommendations have been published. The parties to this proceeding cannot use the record information to alter their grant applications or otherwise benefit from the details of the other applicants’ proposals. At this stage, the parties can only challenge the factual underpinnings of

⁵ See April 19, 2006 “Initial Brief of Roc-Net Holdings, LLC on the Scope of This Proceeding” (“Roc-Net Brief”) at 2 (citing 220 ILCS 5/13-301.3(c)).

⁶ For example, Section 1-5 of the statute provides as follows: “Public policy. It is the purpose of this Code and is declared to be the policy of the State that the principles of competitive bidding and economical procurement practices shall be applicable to all purchases and contracts by or for any State agency.” (30 ILCS 500/1-5).

the various applications and Staff's application of the relevant grant criteria to those facts.

Further, Roc-Net's citation to the provisions of 30 ILCS 500/50-45 is also flawed. That statutory provision applies to the "willful" use of various types of information "to compromise the fairness or integrity of the procurement, bidding, or contract process." Here, the parties would be using the record information for completely permissible and appropriate purposes – to participate in the hearing process contemplated by the RGP, to defend their DDEIF grant applications, and to assist the Commission in its evaluation of the mandatory criteria for the evaluation of the DDEIF grant proposals and the issuance of DDEIF grants. These are valid and appropriate activities.

Finally, Roc-Net's assertion that the Commission's RGP prohibits applicants from providing testimony on anything other than their own application is incorrect. (Roc-Net Brief at 3). Roc-Net also claims that nothing in 83 Ill. Admin. Code § 759 *allows* applicants or third parties to "provide evidence or comment on the proposals of other applicants." (*Id.*). In both instances, Roc-Net fails to acknowledge that neither the RGP nor 83 Ill. Admin. Code § 759 *prohibits* applicants or third parties from providing evidence or comment. The absence of language allowing such testimony does not lead to the conclusion that it is affirmatively *prohibited* any more than the absence of language prohibiting such testimony leads to the conclusion that it is affirmatively *allowed*. Indeed, both authorities are fairly silent on the matter.

Yet, to the extent that the RGP requires applicants to be prepared to offer additional testimony regarding their "eligibility and worthiness" to receive a DDEIF grant award, that testimony certainly would appropriately involve discussion of Staff's treatment of other

applicants' applications. Even Roc-Net concedes as much: "While Roc-Net generally agrees with Verizon Avenue Corporation that parties should be able to refer to other applications to show why one's own application should be approved, any such comment must be subject to the limitations imposed by § 30 ILCS 500/20-35(d) on access to other parties' applications and related data." (Roc-Net Brief at 5). Moreover, to the extent that both the Digital Divide statute and the Commission's administrative rules require the Commission to consider certain criteria, "among other things," it is appropriate to construe those authorities as permitting the consideration of evidence relevant to those criteria, regardless of whether the party offering it is the applicant in question.

Verizon urges the Commission to reject Roc-Net's inappropriately limited process proposal, and instead implement Verizon's, which is streamlined and fair to all parties.

Dated: April 26, 2006

Respectfully submitted,

Verizon Avenue Corporation

By:



John E. Rooney
Sonnenschein Nath & Rosenthal
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-8000
jrooney@sonnenschein.com

A. Randall Vogelzang
Verizon
600 Hidden Ridge
Irving, Texas 75038
(972) 718-2170
randy.vogelzang@verizon.com

Deborah Kuhn
Verizon
205 North Michigan Avenue, 11th Floor
Chicago, Illinois 60601
(312) 260-3326
deborah.kuhn@verizon.com

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NOTICE OF FILING

Please take notice that on April 26, 2006, I caused "Verizon Avenue Corporation's Reply Comments on Process" in the above-captioned matter to be filed electronically with the Illinois Commerce Commission via its E-Docket system.



Deborah Kuhn

CERTIFICATE OF SERVICE

I, Deborah Kuhn, certify that I caused "Verizon Avenue Corporation's Reply Comments on Process," together with a Notice of Filing, to be served upon all parties on the attached service list on this 26th day of April, 2006, by electronic mail.



Deborah Kuhn

**ILLINOIS COMMERCE COMMISSION
DOCKET NO. 06-0187
SERVICE LIST**

Thomas Aridas
Administrative Law Judge
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago, IL 60601
E-Mail: taridas@icc.illinois.gov

Ken Alberts
Director of Utilities
Rochelle Municipal Utilities
Northern Illinois Technology Triangle (NITT)
333 Lincoln Hwy.
PO Box 456
Rochelle, IL 61068
E-Mail: kalberts@rmu.net

Jason Bird
Superintendent of Electric
City of Princeton
Two S. Main St.
Princeton, IL 61356-1708
E-Mail: jbird@princeton-il.com

Aaron W. Brooks
Atty. for RocNet Holdings, LLC
Holmstrom & Kennedy PC
PO Box 589
800 N. Church St.
Rockford, IL 61103
E-Mail: abrooks@holmstromlaw.com

Brandy Bush Brown
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago, IL 60601
E-Mail: bbrown@icc.illinois.gov

Ray Cagle
Chief Operating Officer
Delta Communications, LLC
d/b/a Clearwave Communications
2 N. Vine St.
Harrisburg, IL 62946-1561
E-Mail: rcagle@clearwave.com

Benjamin Clark
Project Manager
Verizon Avenue
12901 Worldgate Dr.
Herndon, VA 20170-6012
E-Mail: ben.clark@verizon.com

Dori Crow
Office Manager
Mt. Vernon.Net, Inc.
#1 Doctor's Park, Ste. H1
Mt. Vernon, IL 62864
E-Mail: dori@mvn.net

Douglas A. Dougherty
Illinois Telecommunications Association, Inc.
300 E. Monroe St., Ste. 306
PO Box 730
Springfield, IL 62705
E-Mail: ddougherty@ameritech.net

Troy A. Fodor
Atty. for Intervenors
Troy A. Fodor, P.C.
913 S. Sixth St.
Springfield, IL 62703
E-Mail: troyafodor@aol.com

E. M. Fulton Jr.
Atty. for Intervenors
Troy A. Fodor, P.C.
913 S. Sixth St.
Springfield, IL 62703

Bruce Giffin
General Manager
Illinois Rural Electric Cooperative
PO Box 80
Winchester, IL 62694
E-Mail: giffin@e-co-op.com

Barry Goodwin
Manager
USA Broadband-EI, LLC
607 S. State St.
Jerseyville, IL 62052-2366
E-Mail: barry@noww.us

William Harris
Electrical Commissioner
City of Sullivan
2 W. Harrison
Sullivan, IL 61951
E-Mail: wharris@sullivanil.us

Matthew L. Harvey
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago, IL 60601-3104
E-Mail: mharvey@icc.illinois.gov

**ILLINOIS COMMERCE COMMISSION
DOCKET NO. 06-0187
SERVICE LIST**

Nancy J. Hertel
Illinois Bell Telephone Company
Floor 25D
225 W. Randolph St.
Chicago, IL 60606
E-Mail: nw1783@sbcb.com

Karen Jackson-Furman
Director of Finance
Egyptian Internet Services, Inc.
1010 W. Broadway, PO Box 158
Steeleville, IL 62288-1312
E-Mail: kfurman@egyptian.net

Paul Jakubczak
Electrical Director
City of Rock Falls
1109 Industrial Park Rd.
Rock Falls, IL 61071
E-Mail: pjakubczak@rockfalls61071.com

Deborah Kuhn
Verizon
205 N. Michigan Ave., Ste. 1100
Chicago, IL 60601
E-Mail: deborah.kuhn@verizon.com

W. James Lally
Chief Financial Advisor
ROC-Net Holdings, LLC
605 Fulton Ave.
Rockford, IL 61103
E-Mail: jlally@eigerlab.org

Ben Moore
Owner
Yamaha of Southern Illinois
3008 S. Park Ave.
Herrin, IL 62948-3721
E-Mail: benmoore@yamahaofsi.com

Stephen J. Moore
Atty. for RocNet Holdings, LLC
Rowland & Moore LLP
200 W. Superior St., Ste. 400
Chicago, IL 60610
E-Mail: steve@telecomreg.com

Dennis K. Muncy
Atty. for Egyptian Internet Services, Inc.
Meyer Capel, a Professional Corporation
306 W. Church St.
PO Box 6750
Champaign, IL 61826-6750
E-Mail: dmuncy@meyercapel.com

Joseph D. Murphy
Atty. for Egyptian Internet Services, Inc.
Meyer Capel, a Professional Corporation
306 W. Church St.
PO Box 6750
Champaign, IL 61826-6750
E-Mail: jmurphy@meyercapel.com

Mark Ortlieb
Illinois Bell Telephone Company
25D
225 W. Randolph
Chicago, IL 60606
E-Mail: mo2753@sbcb.com

Pat Quinn
Lieutenant Governor
State of Illinois
100 W. Randolph, Ste. 15-200
Chicago, IL 60601-3220
E-Mail: pat_quinn@ltgov.state.il.us

Kevin D. Rhoda
Atty. for RocNet Holdings, LLC
Rowland & Moore LLP
200 W. Superior St., Ste. 400
Chicago, IL 60610
E-Mail: krhoda@telecomreg.com

John E. Rooney
Sonnenschein Nath & Rosenthal LLP
233 S. Wacker Dr
Chicago, IL 60606
E-Mail: jrooney@sonnenschein.com

Thomas Rowland
Atty. for RocNet Holdings, LLC
Rowland & Moore LLP
200 W. Superior St., Ste. 400
Chicago, IL 60610
E-Mail: tom@telecomreg.com

**ILLINOIS COMMERCE COMMISSION
DOCKET NO. 06-0187
SERVICE LIST**

Raymond Sinclair
President
Sincsurf, Inc
1665 S. State St.
Jerseyville, IL 62052-3609
E-Mail: ray@sincsurf.net

Gary L. Smith
Atty. for Delta Communications, LLC,
d/b/a Clearwave Communications
Loewenstein, Hagen & Smith, P.C.
1204 S. Fourth St.
Springfield, IL 62703-2229
E-Mail: lexsmith@lhoslaw.com

Robert L. Stivers
Chief Financial Officer
Aero Communications, LLC
Heartland Communications Internet Services, Inc.
1301 Broadway, Ste. 101
Paducah, KY 42001
E-Mail: rstivers@hcis.net

A. Randal Vogelzang
Verizon Services Group
600 Hidden Ridge
Irving, TX 75038
E-Mail: randy.vogelzang@verizon.com

Peter Wagner
Case Manager
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701
E-Mail: pwagner@icc.illinois.gov

Philip J. Wood Jr.
Vice President
Public Affairs Policy & Communications
Verizon
1312 E. Empire St., ILLLARA
PO Box 2955
Bloomington, IL 61702
E-Mail: philip.j.wood.jr@verizon.com

Donald L. Woods
Atty. for Illinois Telecommunications Association
2033 Lindsay Rd.
Springfield, IL 62704
E-Mail: fimhome@aol.com