Illinois Commerce Commission
On Its Own Motion
: 06-0187
Grant awards from Digital Divide
Elimination Infrastructure Fund.

ORDER

September 19, 2006
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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ORDER

By the Commission:

I. Background & Procedural History

On July 1, 2001, PA 92-22 took effect, amending the Public Utilities Act by adding Section 13-301.3. Thereafter, PA 93-306 and PA 93-797, further amended that section, which now provides that:

(a) The Digital Divide Elimination Infrastructure Fund is created as a special fund in the State treasury. All moneys in the Fund shall be used, subject to appropriation, by the Commission to fund (i) the construction of facilities specified in Commission rules adopted under this Section and (ii) the accessible electronic information program, as provided in Section 20 of the Accessible Electronic Information Act. The Commission may accept private and public funds, including federal funds, for deposit into the Fund. Earnings attributable to moneys in the Fund shall be deposited into the Fund.

(b) The Commission shall adopt rules under which it will make grants out of funds appropriated from the Digital Divide Elimination Infrastructure Fund to eligible entities as specified in the rules for the construction of high-speed data transmission facilities in eligible areas of the State. For purposes of determining whether an area is an eligible area, the Commission shall consider, among other things, whether (i) in such area, advanced telecommunications services, as defined in subsection (c) of Section 13-517 of this Act, are under-provided to residential or small business end users, either directly or indirectly through an Internet Service Provider, (ii) such area has a low population density, and (iii) such area has not yet developed a competitive market
for advanced services. In addition, if an entity seeking a grant of funds from the Digital Divide Elimination Infrastructure Fund is an incumbent local exchange carrier having the duty to serve such area, and the obligation to provide advanced services to such area pursuant to Section 13-517 of this Act, the entity shall demonstrate that it has sought and obtained an exemption from such obligation pursuant to subsection (b) of Section 13-517. Any entity seeking a grant of funds from the Digital Divide Elimination Infrastructure Fund shall demonstrate to the Commission that the grant shall be used for the construction of high-speed data transmission facilities in an eligible area and demonstrate that it satisfies all other requirements of the Commission’s rules. The Commission shall determine the information that it deems necessary to award grants pursuant to this Section.

(c) The rules of the Commission shall provide for the competitive selection of recipients of grant funds available from the Digital Divide Elimination Infrastructure Fund pursuant to the Illinois Procurement Code. Grants shall be awarded to bidders chosen on the basis of the criteria established in such rules.

(d) All entities awarded grant moneys under this Section shall maintain all records required by Commission rule for the period of time specified in the rules. Such records shall be subject to audit by the Commission, by any auditor appointed by the State, or by any State officer authorized to conduct audits.

220 ILCS 5/13-301.3

In compliance with subsection (c) of Section 13-301.3, the Commission promulgated rules, duly codified at 83 Ill. Adm. Code 759, and thereafter amended that code part to conform with amendments to the statute effected by PA 93-306 and PA 93-797. That process completed, the Staff compiled for Commission review, and the Commission approved issuance of, a Request for Grant Proposal, to elicit grants from eligible entities as defined by statute, with such proposals to be received by December 15, 2005.

In response to the RFGP, Staff received 17 proposals seeking over $7.1 million in funding (one additional proposal was not received by the required due date, and was not opened for review). Staff evaluated the proposals and prepared a recommendation for each of the 17 timely-submitted proposals.

On March 8, 2006, the Commission entered its order initiating this proceeding. On March 20, 2006, the Administrative Law Judge entered an order which, inter alia, directed the Staff to file, on or before March 28, 2006, a Staff Report containing its recommendations regarding which proposals, if any, the Commission should fund. On March 28, 2006, Staff filed its Report.
Several parties sought and were granted leave to intervene.[1] The ALJ set a procedural schedule, determining that the matter should proceed by way of notice and comment. Eight parties filed Comments, and the Staff and other parties filed Reply Comments.

II. Applicable Legal Framework

The legislature created the Digital Divide Elimination Infrastructure Fund (“DDEIF”) to be used by the Commission to fund the construction of “high speed data transmission facilities in eligible areas of the State.” (220 ILCS 5/13-301.3(b)). The DDEIF statute represents the legislature’s policy goal of ensuring that all areas of Illinois have access to high-speed data transmission facilities.

Because this is a case of first impression, the Commission has no precedent upon which to rely in reaching its conclusions in this proceeding. The legislature, however, has given the Commission guidance in determining what constitutes an “eligible area” under the DDEIF statute:

For purposes of determining whether an area is an eligible area, the Commission shall consider, among other things, whether (i) in such area, advanced telecommunications services, as defined in subsection (c) of Section 13-517 of this Act, are under-provided to residential or small business end users, either directly or indirectly through an Internet Service Provider, (ii) such area has a low population density, and (iii) such area has not yet developed a competitive market for advanced services.

(220 ILCS 5/13-301.3(b)).

Any entity seeking a DDEIF grant “shall demonstrate to the Commission that the grant shall be used for the construction of high-speed data transmission facilities in an eligible area and demonstrate that it satisfies all other requirements of the Commission’s rules.” (220 ILCS 5/13.301.3(b)). The DDEIF statute requires the Commission to establish rules under which it will award DDEIF grants, and mandates that those rules must be consistent with the above-referenced criteria.

Pursuant to this legislative directive, the Commission promulgated administrative rules implementing the procedures to be followed in awarding DDEIF grants. These rules are codified at 83 Ill. Admin. Code Part 759. These Rules include specific provisions regarding “eligible entities”, “eligible uses”, “eligible areas” and standards for selection of grant recipients, specifically economic justification for the proposed project, including social and economic benefits, technical, financial and managerial resources and abilities of applicants and the location of the proposed projects.

Section 759.20 of the Commission’s Rules provides that:
Eligible entities shall be either:

a) An entity that maintains, in good standing, a certificate from the Commission to provide telecommunications services, or

b) An entity that is not required to hold a certificate from the Commission to provide telecommunications services but can demonstrate, through information provided in its grant proposal, its technical, financial and managerial resources and abilities to construct high-speed data transmission facilities.

83 Ill. Adm. Code 759.210

Eligible areas are defined in the rule much as they are by statute, as follows:

a) Grants shall only be used for eligible purposes (see Section 759.220) within an eligible area of the State. For purposes of determining whether an area is an eligible area, the Commission shall consider, among other things, whether:

1) The area, to be served by advanced telecommunications services, as defined in Section 13-517(c) of the Act, is under-provided to residential or small business end users, either directly or indirectly through an Internet Service Provider;

2) The area has a low population density;

3) The area has not yet developed a competitive market for advanced services.

b) If an entity seeking a grant of funds from the Fund is an incumbent local exchange carrier having the duty to serve that area, and the obligation to provide advanced services to that area pursuant to Section 13-517 of the Act [220 ILCS 5/13-517], the entity shall demonstrate that it has sought and obtained an exemption from the obligation to provide advanced services.
83 Ill. Adm. Code 759.230 (emphasis in original)
Eligible uses for grant funds are as follows:

a) The use of grants shall be limited to the payment of certain costs incurred in the construction of high-speed data transmission facilities within an eligible area. (See Section 759.230.) The use of grants shall be limited to payment of the following reasonable and verifiable costs incurred in connection with the project ("eligible costs"):

1) Construction costs, including but not limited to site preparation and construction/installation of equipment and other infrastructure facilities.

2) Purchase of equipment to be installed.

b) Excluded Costs:

1) Costs related to project design or preparation of the grant proposal are explicitly excluded from eligible uses.

2) Costs related to the installation of capital improvements that do not address construction of high-speed data transmission facilities are explicitly excluded from eligible uses.

83 Ill. Adm. Code 759.220

Part 759 describes the selection process to be used to select compliant proposals as follows:

Grantees shall be competitively selected by the Commission. The Commission shall use the following criteria when reviewing proposals and awarding grants:

a) The technical, financial and managerial resources and abilities of the applicant;
b) The economic justification for the project, which includes the social and economic benefits of the project; and

c) The location of the project.

83 Ill. Adm. Code 759.320
III. The Staff Report: Analysis & Recommendations

As noted supra, the Staff filed its Staff Report on March 28. In the Report, the Staff determined that the following proposals met the statutory and regulatory criteria, and recommended that each be funded: (1) Clearwave Communications LLC d/b/a Delta Communications (hereinafter “Clearwave” or “Delta”); (2) Egyptian Internet Services, Inc. (hereinafter “EIS”); (3) Heartland Communications Internet Services, Inc. (hereinafter “Heartland”); (4) Illinois Rural Electric Cooperative (“IREC”); (5) Mt. Vernon.Net; (6) Northern Illinois Technology Triangle (hereinafter “NITT”); (7) City of Sullivan (hereinafter “Sullivan”); (8) USA Broadband-EI, LLC (hereinafter “USAB”); and (9) ROC-Net Holdings, LLC (hereinafter “ROC-Net”). The Staff recommended that ROC-Net’s proposal be funded conditionally, upon a showing that facilities it might lease to complete its project are in fact available, and that funding sources materialize.

The Staff determined that the following proposals failed to satisfy one or more of the statutory and regulatory criteria, and, as a result, recommended that each be denied funding: (1) Aero Communications (hereinafter “Aero”); (2) City of Princeton (hereinafter “Princeton”); (3) City of Rock Falls (hereinafter “Rock Falls”); (4) Sincsurf, Inc. (hereinafter “Sincsurf”); (5) Verizon Avenue (3 proposals); and (6) Yamaha of Southern Illinois (hereinafter “Yamaha”). It was the Staff’s view, set forth in the Staff Report, that the proposals were defective for the following reasons:

Aero Communications – availability of service from other providers; affiliation with another grant applicant, resulting in grant amount exceeding $1 million;

City of Princeton - availability of service from other providers; fact that most of the project has already been constructed;

City of Rock Falls - availability of service from other providers; failure to serve residential or small business users.

Sincsurf, Inc. – failure to respond to RFGP; proposal sought funding for operating expenses, an “excluded purpose” under Section 759.230(b).

Verizon Avenue – all projects completed prior to grant application.

Yamaha of Southern Illinois[2] – lack of specific proposal; lack of technical, managerial and/or financial resources and abilities.

The total amount of funding for all projects recommended in the Staff Report was $4,611,083.

IV. Applicant/Party proposals, arguments & positions
The ITA’s initial comments were based upon its review of the March 28, 2006, Telecommunications Division Staff Report and the applications of five companies, Northern Illinois Technology Triangle ("NITT"), Heartland Communications Internet Services, Inc. ("Heartland" or "HCIS"), ROC-Net Holdings LLC. ("ROC-Net"), Clearwave Communications, ("Clearwave"), and U.S. Broadband-EI LLC ("USAB").

Based upon this review, the ITA expresses “grave” concerns over the facts relied upon by Staff in recommending the funding of all of these projects and, accordingly, suggested that a new application process be undertaken through which the Commission could obtain relevant, meaningful information that would allow it to make a more fully informed decision before it dispenses public funds to private entities.

ITA describes its “grave” concerns as:

1. Staff’s rejection of satellite service as a competitive broadband provider in underserved areas (ITA @ 4-5);
2. Staff’s reliance on varying population density figures in the applications (ITA @ 5-6);
3. The absence of market surveys on the pricing for services and take rates to assure the economic viability of the proposed projects (ITA @ 6-8);
4. The absence of specific financial information in four out of five applications (ITA @ 7); and
5. The overlap of Delta’s application and Heartland’s application with the suggestion that only one should be granted or that the grant of one of the two should be reduced to eliminate support for seven counties (ITA @ 8-9).

In the event that the Commission disagrees with ITA that a new application process should be undertaken, ITA proposes that, at a minimum, the Commission require each entity, as a condition of accepting DDEIF monies, to execute and file with the Commission a performance bond, equal to the amount of funding it receives. ITA reasons that this would assure the taxpayers of the State of Illinois that their monies would have some measure of protection in the event that the projects contemplated by the applicants do not come to fruition.

ITA addresses a litany of concerns it had with this process and proceeding in its pleadings. These concerns deal with both “generic issues” as well as what ITA perceives to be specific deficiencies in certain Applications.

In terms of the application and the application process, the ITA first states that Staff had rejected satellite service in deciding whether an area was underserved, based upon Staff’s view that, despite its ubiquity, satellite service is too slow and too expensive to be
considered as a viable alternative to broadband. The ITA then notes that, despite the fact that low population density is specifically listed as an indicator that an area is an "eligible area" under Section 759.320(2), Staff used population density "for illustrative purposes only."

The ITA argues that Staff erred in discounting satellite service as an alternative to broadband and that Staff’s assertions regarding the technological and economic constraints of satellite service were unsupported by any reference to any authoritative source and were at best speculation and surmise. The ITA states that Staff had admitted that satellite service was available throughout the state so, if it could be shown that satellite service was technically and economically similar to the type of service the applicants wished to provide, the digital divide may simply fill itself in through the efforts of satellite providers. The ITA asserts that Staff should have addressed the issue of satellite service on a case by case basis, and should not have simply discounted the issue based upon its unsupported and apparently incorrect view of the costs and technological barriers attached to satellite service. The ITA asserts that this issue alone tinctured Staff’s entire review process and should, without more, lead to the Commission ordering a reexamination of the grant requests.

The ITA then addresses disparities between the companies’ treatment of population density figures and the fact that Staff’s application did not require the submission of uniform information. The ITA asserts that it was Staff that developed the Request for Grant forms. If Staff failed to require the uniform reporting of population densities, despite the fact that the Commission’s rules require the consideration of the issue, the proper approach was to amend the rules or require a second submission under Section 759.310(6), which specifies that applicant must include "a description of the area as it relates to the eligible area criteria." The ITA argues that it was not acceptable to disregard population density figures because the applicants were unwilling or unable to provide Staff with information that would allow an "apples to apples" comparison. The ITA opines that Staff’s failure to insist on such information made the entire process even more suspect when coupled with its disregard for satellite technology.

The next issue addressed by the ITA in terms of the Staff Report was the extent to which Staff addressed the likelihood that the various projects were economically viable. The Staff Report refers to three of the projects (Sullivan, Mount Vernon Net and IREC) as "low risk," a term that does not appear in any of the remaining Staff Assessments of any of the applicants. According to ITA, Staff notes that NITT’s proposal is "high risk," but recommends granting funds to that entity anyway. The ITA posits that the absence of any consistent risk descriptions of the five specific applications it had reviewed was not that surprising, since none of the five proposals contained any market surveys of their project areas. The ITA suggests that such studies should be required, at a minimum, to determine pricing for services and take rates for them. Without these studies it is unclear whether any of these projects are financially viable, thereby increasing the likelihood that the projects will not be completed in their entirety because the applicants have obviously failed to examine the
projects on a beginning to end basis.

Further, ITA notes that four of the five proposals it reviewed did not include any company specific financial information such as balance sheets or income statements (Clearwave Communications included financial statements). According to ITA, in the four proposals where financials were lacking, it was unclear how the projects would be financially supported by the applicant. Under these circumstances the ITA cautions the Commission against simply tossing taxpayer funds into the air without some assurance that the funds would accomplish their intended purpose and again suggested the requirement of a performance bond to hold taxpayers harmless in the event that the projects were not completed.

The next generic issue addressed by the ITA in terms of the Staff Report was its calculation of a ratio of grant funds that varies per proposal. For example in the Clearwave staff report Overview (p.15 of Staff Report) staff states the grant will provide broadband service to a number of households resulting in a ratio of dollars of grant award per household. The staff Overview for the Heartland proposal states that the grant will reach a number of subscribers for a ratio of taxpayer dollars awarded per anticipated subscribers. The NITT Overview states that its offering will reach a number of residents resulting in a ratio of dollars per resident. The ITA admits that, while this may have been a matter of semantics, it underscores the various proposals’ lack of market analysis for the areas to be served. According to ITA, the proposals could have clearly identified specific communities or geographic areas where broadband services were lacking (less than two providers) or where there were no services. Instead many of the proposals seem to be based only the offering of broadband services with no assurance that the offering will be at a rate that will allow households and businesses to actually purchase the service. Further, the proposals seem to accept the entire population of the areas proposed to be served as the universe of potential subscribers of broadband services but do not consider the number of households without telephone service, the number of households without a computer, the number of households with computers incapable of transmitting at broadband speeds or the number of households already purchasing a broadband service. ITA opines that taking all these matters into consideration would change Staff’s calculations of the cost of providing or "reaching" or "offering" high speed Internet connectivity to "households" or "residents" or "potential subscribers" in a given area.

Finally, the ITA notes that Staff recommended against giving funds to several of the applicants because of an overlap of the areas to be served with other applicants. ITA views the Heartland and Clearwave proposals as significantly overlapping, yet both are recommended for funding. Seven of the ten counties listed as the project area for Heartland are listed in the Clearwave proposals service area. ITA maintains either one of the two companies’ applications should be denied or grant funds to support these seven counties’ high speed Internet connectivity should be eliminated from one of the two proposals.
After setting forth its general criticisms, ITA turned its attention to specific problems it had with certain Applications. The ITA’s first comment on the Heartland proposal was that, while the Staff Report states that this proposal if funded would ultimately reach [a specific number of] subscribers, the number cited by Staff does not appear in the proposal. In Section D of the proposal Heartland states, HCIS proposes to build out a wireless network reaching over [a thousand fewer] subscribers than referenced in the Staff Report. Then later in the Section, HCIS states that upon completion of the project over [500 fewer subscribers than referenced by Staff] will have access to at least one additional choice. Using the average of the various numbers contained in the Staff Report and Application, the ITA calculates a cost per subscriber ratio (exclusive of customer premise equipment) that calls into question the financial viability of such a business plan. The ITA also states that Heartland’s proposed fee structure was similar to the cost for satellite service, further supporting the ITA’s assertion that satellite service should have been viewed as a comparable service in determining eligible areas of the state.

ITA notes that the Clearwave proposal calls for a majority of the grant funds to be used to enable Clearwave Communications to connect to the network. According to ITA, the bulk of those funds will be dedicated to communities that already have a competitive marketplace with four, five and even six current providers of high speed connectivity. Remarkably, in one community, Clearwave wants state funds to help them become the eighth provider of broadband. ITA maintains that Clearwave’s approach is as troublesome and self serving as Staff’s discounting satellite providers because existing resellers of an ILEC’s DSL capability are functional equivalents for facilities-based providers of broadband as well as major competitors for high speed connectivity in any community. In ITA’s opinion, if resellers are brought back into the picture, the underserved communities within the geographic scope of this project would be limited to a hand full of cities. ITA urges the Commission to reduce the grant amount of this proposal to the costs associated with bringing broadband service to these communities.

The ITA began its comments upon the ROC-Net proposal by stating that its magnitude and the funding contingencies upon which the total project is based give it great uncertainty, particularly given the fact that the ROC-Net proposal is a 175- page document containing much tangential material and supportive documents but little in the way of a definitive plan of deployment. According to ITA, the two pages that comprise Section K, Technical Description, give the best indication of how the project would be implemented. ITA states that the time lines presented are unrealistic[3]. ITA maintains that the assertions in Section K of ROC-Net’s proposal were beyond ambitious, bordering on the incredulous. ITA posits that it was unfortunate that Roc-Net, with a track record of deploying fixed wireless in Rockford, Illinois, did not scale a project to fit a one year time frame and use this grant cycle to bring high speed Internet connectivity to those small rural communities in Winnebago County that are currently truly under served.

ITA questions two specific areas of the USA Broadband proposal. The ITA states
that on pages 16 and 17, Section I. Advanced Services Currently Available, the proposal did not recognize the offerings of the Incumbent Local Exchange Carriers in the project area, i.e., AT&T, Verizon, Citizens/Frontier and Stelle Mutual. The ITA asserts that Verizon Avenue offers high speed Internet connectivity in Rantoul; AT&T offers DSL in Danville, Gibson City and Watseka; Citizens offers DSL in the small communities of Kempton and Cullom both of which have residents in Ford County and Stelle Mutual offers wireless high speed connectivity to the entire community.

In addition to the above, the ITA asserts that USAB’s proposal states that, “Mediacom is the incumbent cable company in Rantoul and Paxton and offers high speed data service” but that USAB’s proposal did not recognize any other cable provider(s) in the project area. The ITA presumes that residents of larger communities like Danville, Gibson City, Watseka, etc. are served by a cable company offering cable modem service. According to ITA, this brings into question the proposal’s assertion that it would allow USAB to provide high speed Internet connectivity to the number of residents upon which it was based. If the larger communities in the three county area were recognized to have more than one provider of broadband, the benefits of this proposal would be greatly diminished. Subtracting the residents of Danville (49,680), Gibson City (which the ITA states is 3,341 making the figure on page 15 of the USAB proposal incorrect), Watseka (5,572), Paxton (4,486), Kempton (235), and Stelle (220) from the total upon which the proposal was based leaves a much smaller potentially underserved population. In ITA’s opinion, this issue is exacerbated by USAB’s admission that, “extreme levels of customer penetration are not needed for success and the business plan models only assume a [proprietary number] penetration” (p14). Using the average of that projected take rate and an adjusted potential market results in a mathematically staggering cost per household. The ITA asserts that a connectivity business model based on the type of adjusted expenses per subscriber indicated by the adjusted population figure could not be rationally substantiated.

The ITA’s second area of concern with USAB’s proposal was the apparent discrepancy between the miles of fiber and fiber conduit described on pages 21 and 29 of the proposal. On page 21 of the proposal, fiber transport from Paxton to Champaign is shown as totaling one figure, while on page 29 it states the fiber transport mileage is greater than previously stated. The ITA avers that such a discrepancy is significant given the costs per mile of pulling fiber through conduit. Further, the projected fiber transport based on existing conduit is given as one figure on page 21 and another on page 29. ITA could not determine which figure was correct in its opinion, but the difference is important because of the cost of pulling fiber through conduit. The ITA also states that Section L Cost Information did not contain any cost for pulling fiber through any miles of conduit to support the transport of the wireless data from end-users. The ITA urges the Commission to question the financial viability of this proposal and the risks associated with granting a million dollars of state funds based upon the information provided.
The ITA expresses concerns with many aspects of the NITT’s project, particularly the alleged number of under served households in the project area and the limited number of potential households that would benefit from it. The ITA began by stating that the proposal could not be seen as benefiting any of the larger communities in the area, all of which have multiple providers of broadband and could not be considered to be under served. The ITA notes that Verizon offers DSL in Cherry Valley and Byron as well as Rochelle, while cable modem services are also available in these communities. According to ITA, there are existing providers of high speed connectivity in the communities of Creston, Malta and Clare. According to the ITA, all of these communities must be removed from any area that is being classified as “under served”.

ITA maintains that the remaining communities have a much smaller total population than utilized in the NITT application and relied upon by Staff. Using the NITT’s projected take rate and the number of under served households in the remaining communities the average cost of providing high speed Internet connectivity to the under served households in the region would be staggering. According to ITA, even if the take rate were 100%, the average cost per household would still be enormous. The ITA posits that this was clearly not the type of profligate expenditure that was contemplated by the legislature in enacting the Digital Divide Infrastructure Elimination Fund.

In terms of the NITT’s managerial abilities, the ITA notes that the NITT proposal on page 7 states, “The NITT intends to create a not-for-profit entity to own, manage, and operate the NITT network. Since this organization does not yet exist formally, we cannot provide financial statements, etc.” The ITA queries as to whether the lack of any type of management entity might explain the NITT’s request for funding at the unprecedented expense ratio discussed above and maintains that the lack of a business pro forma and projected financial statements was troubling and makes the Commission staff’s recommendation to award $1,000,000 to the NITT, an organization that doesn’t yet exist, extremely risky.

Finally the ITA expresses concerns that major portions of the NITT proposal are identical to the project presented at the ICC sponsored Rural Digital Divide Workshop on August 31, 2005 by Robert Rogde, Engineering Superintendent for the Rochelle Municipal Utilities (RMU). The RMU project included a fiber route from Rochelle to Rockford for the purpose of enabling Rochelle to create a technology hub and service high capacity data transport for enterprise businesses by tying the fiber route in Rockford with the Illinois Tollway Authority. The ITA questions the use of funds intended to remedy the lack high speed access in underserved communities to subsidize high capacity data transport for businesses or to assist the City of Rochelle to become a technology hub. According to the ITA, those uses clearly fell outside of the intended goals of the program as stated in the ICC Request for Grant Proposals which stated, in part on page 1, “The Commission seeks to encourage and ensure the construction of high speed data transmission facilities for the provision of advanced telecommunications services to residential and small business end-
users in under provided areas of the state....” This would not entail the elevation of a city to the status of a technology hub.

CITY OF PRINCETON

The project for which the City of Princeton is requesting DDEIF funding involves a new and innovative technology; Broadband over Power Lines (“BPL”). The City of Princeton owns and operates its own municipal electric utility system and therefore it is uniquely positioned to implement this new technology.

The Princeton’s Grant Application shows that it began investigating the lack of high-speed telecommunications services available to local businesses and residents in 2001 and that it conducted a feasibility study in 2003. Thereafter, in 2004 Princeton installed several miles of fiber optic cable for data and internet services in 2004. The proposed project for which Princeton seeks partial funding from the DDEIF will utilize and expand Princeton’s fiber optic network as a platform for delivering BPL to small businesses and residential customers in the city. Princeton’s Grant Application also shows that Princeton and its partner in the BPL service offering, IV Net, have successfully launched a small pilot phase of the project to demonstrate technical and economic viability. Having proven the viability of this new technology through its pilot testing, Princeton requests DDEIF funding to offset the cost of the roll out of the BPL project to the remainder of its residents and businesses.

According to Princeton, BPL is a high-speed broadband service that qualifies as an advanced telecommunications service within the meaning of the statute regulating the DDEIF. This unique and innovative project has substantial inherent benefits for Illinois as a whole. Princeton asserts that since all homes and businesses, even in the most rural areas, already have power lines in place serving them with electricity, successful BPL projects will greatly increase the likelihood of other BPL projects in the future that will be able to bring advanced telecommunications services to all Illinois citizens.

Princeton argues that it is an “eligible entity” within the meaning of 83 Ill.Adm.Code 759.210. Princeton has Certificates of Service Authority from the Commission by virtue of the Order entered in ICC Docket No. 99-0020. Princeton is in good standing with respect to its Certificates. Princeton avers that it possesses the technical, financial and managerial resources and abilities to construct high-speed data transmission facilities. Princeton maintains that it has demonstrated these resources and abilities by the construction and operation of several miles of fiber optic cable and the associated network facilities and through the pilot testing of the BPL service. Princeton’s Verified Comments also showed its view of the social and economic benefits of its BPL project in accordance with 83 Ill.Adm.Code 759.320.
Princeton opines that its BPL project is an “eligible use” within the meaning of 83 Ill.Adm.Code 759.220 and Section 13-301.3 of the Public Utilities Act. The facilities to be constructed by Princeton to roll out the remainder of its BPL project are high-speed data transmission facilities.

Princeton responded to Staff’s overfunding concern. According to Princeton, the costs to be incurred for the construction of the facilities to roll out the remainder of Princeton’s BPL project are clearly shown in the Project Budget that was included in Princeton’s grant application. Princeton listed the line items from the Project Budget in its Verified Comments as follows:

Fiber Backhaul equipment, including Network Operation Center facilities (servers, switches and racks), Fiber Cable, ADSS Hardware/Closures, Fiber Management Software, and E-PON Electronics; BPD Buildout, including BPL Pilot Project Equipment, Buildout Material (fiber, pole attachments, etc.); Concentrator Units, Medium Voltage Repeaters, Low Voltage Repeater, Low Voltage Cust Premise Equipment, Couplers, Neutral Couplers, Kit Assembly, Meter Socket Adapter, NMPlus Software License, Additional License Antispam, E-mail, etc., and Utility Monitoring Applications; Fiber Backhaul Labor, including Fiber Installation and Technical Supervision and Assistance by ISP; BPL Labor, including Fiber Installation, Fiber Splicing, CU/Repeater Installation, Technical Supervision and Assistance by ISP, and Boring; and Construction Equipment necessary for construction, including fiber trailer, pull tensioner, pulling drum, combo level line, disk brakes and trucks for Fiber Backhaul and for trucks for the BPL Buildout.

According to Princeton, the foregoing costs are all “construction costs, including but not limited to site preparation and construction/installation of equipment and other infrastructure facilities” or costs for the “purchase of equipment to be installed” as required by 83 Ill.Adm.Code 759.220. Princeton avers that its list of costs does not include any “costs related to project design or [for] preparation of the grant proposal” or any “costs related to the installation of capital improvements that do not address construction of high-speed data transmission facilities” as required by 83 Ill.Adm.Code 759.220. Therefore, Princeton maintains, the costs shown in Princeton’s Project Budget are “eligible costs” and do not include any “excluded costs” under the rule.

Princeton also argues that it has specifically addressed Staff’s concerns about whether a grant to the City would constitute retroactive funding. Princeton opines that it showed that the majority of the “eligible costs” for its BPL project as identified above have not already been expended and that a grant to Princeton for its BPL project would not be retroactive funding. Princeton maintains that it was reasonable and necessary for purposes of its BPL project, which is a new and innovative technology, to construct a portion of the
facilities and conduct the pilot testing to prove the viability of the technology prior to requesting funding. Princeton’s Verified Comments showed that the vast majority of the facilities for the BPL project will be constructed and the costs therefore incurred in additional phases of the project in the future. Princeton states that these additional phases have been delayed from the schedule set forth in its grant application pending the outcome of this proceeding.

Princeton’s Verified Comments specifically identified the cost items from the above list that have already been expended as follows: (1) the Fiber Backhaul equipment, including Network Operation Center facilities (servers, switches and racks), Fiber Cable, ADSS Hardware/Closures, Fiber Management Software, and E-PON Electronics; (2) the BPL Pilot Project Equipment; (3) the Fiber Backhaul Labor, including Fiber Installation and Technical Supervision and Assistance by ISP; and (4) Construction Equipment necessary for construction, including fiber trailer, pull tensioner, pulling drum, combo level line, disk brakes and trucks for Fiber Backhaul. A comparison of Princeton’s Project Budget in its grant application shows the remaining line items and their costs. Princeton’s Verified Comments state that the cost items already expended total $475,203 out of a total project budget of $1,875,514. $1,382,311 of the project costs remain to be incurred.

Princeton argues that its grant request complies with the funding limits in 83 Ill.Adm.Code Section 759.330(a) even if the $475,203 that has already been spent is excluded from its budget because the remaining budget of $1,382,311 is approximately three (3) times the amount of funding requested by Princeton. Princeton argues in its Verified Comments that its expenditures on the pilot phase of the project should not be excluded from its budget for purposes of DDEIF funding because it actually spent the money as required by the rule, because pilot testing is reasonable and necessary for a new innovative technology and because Princeton had no choice but to begin its pilot testing phase prior the filing of its grant application or the determination of grant awards in light of the 2 year time limit for completing projects in 83 Ill.Adm.Code Section 759.330(e) and the Illinois Grant Funds Recovery Act, 30 ILCS 705/5. Princeton argues that given the two (2) year requirement to complete the project, counting the expenditures made in connection with the pilot phase of the project towards the three (3) times grant award requirement would be reasonable and would not constitute retroactive funding.

Additionally, Princeton disputes Staff’s conclusion that it is not an underserved area. According to Princeton, it showed in its Verified Comments that its city limits should be found to be an “eligible area” within the meaning of 83 Ill.Adm.Code 759.230 and Section 13-301.3 of the Public Utilities Act. Princeton avers that there are 3 existing providers of broadband services, not 4. Princeton also avers, based on the rate of customer migration from dial-up service to the existing broadband providers, that “advanced telecommunications
services, as defined in Section 13-517(c) of the Act, is under-provided to residential or small business end users” and that “the area has not yet developed a competitive market for advanced services.”

Princeton’s Verified Comments state that the providers of broadband service in the city are as follows: the incumbent local exchange carrier, Verizon, provides DSL service; a regional ISP, MTCO Communications, provides DSL service; and the local cable TV provider, Insight Communications, provides cable modem service. Princeton explains that the fourth entity that Staff identified from Princeton’s grant application is its partner in the BPL project, IVNet, and that the small number of customers served by the City and IVNet are from the pilot phase of the BPL project. The pilot phase was a test phase and is available only in a very limited portion of the city. The BPL service has not yet been rolled out. Princeton also opines that advanced telecommunications services, as defined in Section 13-517(c) of the Act, is under-provided to residential or small business end users” and that “the area has not yet developed a competitive market for advanced services.

According to Princeton, there are three providers of advanced services in Princeton; 2 DSL providers and 1 cable modem, and at least two of them have been offering service since December of 2004. In its Grant Application and its Verified Comments, Princeton asserts that while there is some level of competition in Princeton, the reality is that most customers are still waiting for a reliable, quality and reasonably priced broadband service. To support this assertion, Princeton attests that IV Net had over 600 dial-up customers in Princeton prior to any broadband services being offered in the community, and that as of December 2005 the vast majority of those customers (477) have not switched to one of the existing broadband providers. Princeton also attests that it continues to receive numerous requests from citizens for its BPL service on a regular basis.

Princeton argues in its Verified Comments that the Staff’s approach of just counting heads does not comply with the statute or the ICC rules. The proper question whether advanced telecommunications services (i.e., 200 kbps or more in at least one direction) are under-provided to residential or small business end users in the area; (ii) whether the area has a low population density; and (iii) whether the area has not yet developed a competitive market for advanced services. (Emphasis added by Princeton). According to Princeton, advanced telecommunications services are under-provided to residential or small business end users in Princeton and the area has not yet developed a competitive market for advanced services. (Emphasis added by Princeton).

Princeton identified an additional issue in its Verified Comments. Princeton states that the additional funding to Princeton, if granted, may cause the total approved funding
requests to exceed available amounts in the DDEIF. Princeton’s position is that if and to
the extent that the Commission ultimately approves projects for funding that cause the
approved funding requests to exceed available amounts in the DDEIF, then all successful
applicants should have their funding requests reduced proportionately so as not to
overspend the DDEIF.

Finally, Princeton points out that Delta Communications, LLC d/b/a Clearwave
Communications opposes Princeton’s position that all successful applicants should have their funding
requests reduced proportionately so as not to overspend the Fund if the Commission ultimately
approves projects for funding that cause the approved funding requests to exceed available amounts in
the DDEIF.

CITY OF ROCK FALLS

The City of Rock Falls points out that its Grant Application seeking funding from the
DDEIF was submitted in a proper and timely manner. Rock Falls’ Grant Application
explains that it has installed and maintained over 20 miles of fiber optic cable throughout its
service area for use by its city-owned electric utility and for Rock Falls’ Local Area Network
(“LAN”). Rock Falls has also partnered with the Illinois Century Network to run fiber to the
local area schools to provide internet connectivity for educational learning. The proposed
project for which Rock Falls seeks partial funding from the DDEIF will utilize and expand
Rock Falls’ fiber optic network to allow for advanced telecommunications services to be
provided to Rock Falls’ business community which consists of over 400 business and
commercial customers, 350 of which would be considered small businesses. The current
project does not contemplate service to residential customers, although the fiber buildout to
reach the businesses in Rock Falls will pass certain residential areas, and it is anticipated
that future projects will expand the fiber network further to allow for advanced
telecommunications services to be provided to Rock Falls’ residential customers and will
include residential offerings.

Rock Falls takes issue with Staff’s determination that Rock Falls is not an
“underserved” area. According to Rock Falls, the Staff Report focuses on the number of
existing Internet Service Providers (“ISPs”) in the area. Neither the statute that governs the
DDEIF nor the ICC Rules provide the number of existing ISPs that will cause an area to not
be deemed “underserved”. The PUA and the ICC Rules speak in terms of end users, low
population density and undeveloped competitive market. Rock Falls believes that the
evidence it set forth shows that of the 5 entities identified in Rock Falls’ Grant Application as
providers of internet services, only one (the local cable TV provider, Insight
Communications) offers advanced telecommunications services as that term is defined in
Section 13-517(c) of the Public Utilities Act, 220 ILCS 5/13-517(c) (200 kbps or more in at
least one direction) throughout Rock Falls, and that provider has only been offering such service for approximately 6 months. The other internet providers offer dial-up service at a maximum speed of 56 kbps throughout Rock Falls.

According to Rock Falls, there is only very limited DSL and wireless internet service available in Rock Falls. The local telephone company does not offer DSL. One of the other providers has facilities and offers DSL service in a very small portion of Rock Falls from its head end located in a nearby city north of Rock Falls and wireless service to a very small portion of the city from a tower located outside of the city on the east. These services cover only two very small portions of the 60 square miles that make up Rock Falls and surrounds, and they are not available to most of the businesses in the city that will be benefited by Rock Falls’ fiber project because the vast majority of the businesses in the city are located in the central, western and southern portions thereof. According to Rock Falls, it and its surrounding areas should be determined to be an “eligible area” for purposes of the DDEIF because advanced telecommunications services are under-provided to residential or small business end users in the Rock Falls, and such area has not yet developed a competitive market for advanced services. In most of the city and the areas where it is targeting its service, the Rock Falls will be only the second provider of advanced telecommunications services.

Rock Falls also argues that the Staff misreads and misinterprets the language in the statute and ICC Rules. According to Rock Falls, the Staff Report incorrectly states that “Section 13-301.3(b) of the Act uses the terms ‘residential and small business’ entities in its description of end users.” In fact, the statute and ICC Rules use the terms “residential or small business end users”. (Emphasis added by Rock Falls.) Rock Falls’ current project will allow for advanced telecommunications services to be provided to several hundred business and commercial customers, the majority of which would be considered small businesses, and therefore fully complies with the statute and the ICC Rules. While residential areas are not targeted at the present time, it is anticipated that future projects will expand Rock Falls’ fiber network to allow for advanced telecommunications services to be provided to residential customers.

According to Rock Falls, it is an “eligible entity”; the project proposed for funding by Rock Falls is an “eligible use”; the geographic area of Rock Falls’ proposed project is an “eligible area”; there is economic justification for Rock Falls’ proposed project, including social and economic benefits. Therefore, Rock Falls request that the Commission grant its request for funding from the Digital Divide Elimination Infrastructure Fund.

According to Rock Falls, because its request for funding is a relatively small amount,
the additional funding to Rock Falls should not cause the total approved funding requests to exceed available amounts in the DDEIF. If and to the extent that the Commission ultimately approves projects for funding that cause the approved funding requests to exceed available amounts in the DDEIF, then it is Rock Falls’ position that all successful applicants should have their funding requests reduced proportionately so as not to overspend the Fund.

According to Rock Falls, the Commission promulgated rules regarding the Digital Divide Elimination Infrastructure Fund under Section 13-301.3 of the Act, and they are codified at Part 759 of Title 83 of the Illinois Administrative Code. These Rules include specific provisions regarding “eligible entities”, “eligible uses”, “eligible areas” and standards for selection of grant recipients, specifically economic justification for the proposed project, including social and economic benefits, technical, financial and managerial resources and abilities of Applicants and the location of the proposed projects. Rock Falls addressed the provisions of these ICC Rules and the merits of the City of Rock Falls’ proposal under each.

Rock Falls looks to Section 759.210 of the ICC Rules, 83 Ill.Adm.Code 759.210, and its definition of “eligible entities” for purposes of the Digital Divide Elimination Infrastructure Fund. Rock Falls points to its Certificates of Authority from the Commission by virtue of the Order entered in ICC Docket No. 98-0325. According to Rock Falls, it is in good standing with respect to its Certificates. Rock Falls also argues that it possesses the technical, financial and managerial resources and abilities to construct high-speed data transmission facilities. Rock Falls believes it has demonstrated these resources and abilities by the construction and operation of 20 miles of fiber optic cable and the associated network facilities, including service to the local schools.

Rock Falls also argues that the project proposed for funding for the city is an eligible use as defined by Section 759.220 of the ICC Rules.

Rock Falls’ proposed project will include the installation of Head End Distribution Equipment, including switch and router equipment, at an estimated $100,000.00; Fiber Optic Buildout Customer Side, including expansion of the fiber ring to reach additional business areas and fiber to the building, at an estimated $50,000.00; Customer Premise Equipment at an estimated $50,000.00; Fiber Optic Build Out to ISP at an estimated $80,000.00; and Existing Fiber Testing and Splicing at an estimated $20,000.00. Rock Falls opines that these costs do not include any “excluded costs” under the above rule and the project proposed for funding by the City of Rock Falls is an “eligible use”.
Rock Falls maintains that Section 759.330(a) of the ICC Rules imposes a limitation on the costs that can be funded under the DDEIF. It requires that “[e]ach grant shall be awarded from the Fund under the condition that the grantee shall agree to expend a minimum of three times the amount of the grant award on eligible costs incurred in connection with the project.” Rock Falls’ avers that the estimated eligible costs associated with the proposed project is $300,000, which means the estimated eligible cost of the proposed project is significantly more than Rock Falls’ requested funding.

Rock Falls avers that Section 759.330(e) of the ICC Rules requires that “[g]rantees must expend all funds received from the Commission in under two years’ time.” While Staff has challenged the scope of Rock Falls’ proposed project because it does not extend to residential customers in the city, Rock Falls believes the limited scope of the project to the business areas of the city will ensure that Rock Falls can meet the requirement to complete the project in 2 years. Inclusion of all residential and business customers in Rock Falls within this project would likely take longer than the 2 years time frame. Rock Falls argues that controlled expansion of Rock Falls’ fiber network is reasonable and consistent with this rule.

Rock Falls also argues it is an “eligible area” pursuant to Section 759.230 of Ill. Adm.Code.

In making its determination whether the City of Rock Falls is an “underserved” area, the Staff Report focuses on the number of existing ISPs in the area. According to Rock Falls, Staff does not believe that the City of Rock Falls is an “underserved area” because there are 5 providers of internet services: Insight, the local cable TV provider, SBC/AT&T, the incumbent local exchange carrier and 3 local ISPs. The 3 local ISPs are Cin.net, William & Mary Computer Center and Essex Telecom of Sterling.

Rock Falls posits that neither the statute that governs the DDEIF nor the ICC Rules provide the number of existing ISPs that will cause an area to not be deemed to be “underserved”. The statute and the ICC Rules speak in terms of end users, low population density and undeveloped competitive market. Rock Falls has a low population density. The Staff Report calculates it has 160 residents per square mile based on a population of 9,580 over 60 square miles.

Rock Falls maintains that a review of the service offerings by Insight, SBC/AT&T, Cin.net, William & Mary Computer Center and Essex Telecom of Sterling shows that advanced telecommunications services (200 kbps or more in at least one direction) are
under-provided to residential or small business end users, either directly or indirectly through an Internet Service Provider, and such area has not yet developed a competitive market for advanced services.

According to Rock Falls, Insight offers cable modem service in Rock Falls throughout the city where cable TV service is available, and it had done so for approximately 6 months. It is Rock Falls’ understanding that cable modem service meets the definition of an advanced service even though service quality degrades the farther from the head end the customer is located.

Rock Falls posits that the local telephone company, SBC/AT&T, does not offer DSL in Rock Falls. SBC/AT&T has T-1 capability available in the $650-$700 per month range, but it is Rock Falls’ understanding that even the ICC Staff in the Staff Report has excluded T-1 capability from its consideration on this issue.

Rock Falls states that Cin.net offers only dial-up internet service in Rock Falls. This service has a maximum speed of 56 kbps. Cin.net offers wireless internet service in other areas of the state, but does not offer wireless internet service in Rock Falls.

Rock Falls asserts that Essex offers dial-up internet service in Rock Falls that has a maximum speed of 56 kbps. Essex offers DSL service from its head end in Sterling (which is located north of Rock Falls and across the Rock River) to a very small portion of the northern part of Rock Falls. The Essex head end is located approximately one mile north of Rock Falls and the DSL service has a maximum range of approximately 17,000 feet. This service covers only a very small portion of the 60 square miles that make up the City of Rock Falls and surrounds. This service is not available to most of the businesses in the City that will be benefited by Rock Falls’ fiber project. The vast majority of the businesses in Rock Falls are located in the central, western and southern portions of Rock Falls. Essex also leases space on 1 tower located approximately 2 miles east of the city limits on the each side of Rock Falls from which they could offer wireless internet, but they have no customers of that service in Rock Falls. The service available from this tower is extremely limited covering a maximum of 6-7 miles from the tower and requiring a direct line site. Thus, according to Rock Falls, this service likewise covers only a very small portion of the 60 square miles that make up the City of Rock Falls and surrounds and is not available to most of the businesses in Rock Falls that will be benefited by Rock Falls’ project. As shown in Rock Falls’ Grant Application, Essex will be partnering with Rock Falls to offer the high speed broadband service over Rock Falls’ fiber optic network and thus should not be considered a separate provider for purposes of determining whether Rock Falls is an “eligible area”.
William & Mary Computer Center is listed in the telephone book as an ISP in Rock Falls, but they are really just an agent of Essex. They offer dial-up internet service in Rock Falls that has a maximum speed of 56 kbps using the facilities of Essex. They also offer the very limited DSL and wireless internet services of Essex in the limited areas of Rock Falls where those services are available from Essex.

Based upon the foregoing, the City of Rock Falls posits that it and its surrounding areas should be determined to be an “eligible area” for purposes of the DDEIF because advanced telecommunications services are under-provided to residential or small business end users in the City of Rock Falls, and such area has not yet developed a competitive market for advanced services. In most of the city and the areas where it is targeting its project, Rock Falls will be only the second provider of advanced telecommunications services.

Rock Falls also raises a policy argument for why its proposed project should be funded. According to Rock Fall, it is well recognized that “If a business is not connected it cannot compete.” The City of Rock Falls broadband initiative will provide economic and social benefits to all of its current and future business and commercial customers, the vast majority of which are small businesses. Rock Falls’ believes its project will allow its business customers a chance to compete in a global economy by providing them with a high speed, reliable, and secure connection to the outside world. Rock Falls maintains that with the current offerings available in Rock Falls, business and commercial customers are limited in their abilities to compete across the nation and the world. By giving them this synchronous connectivity they will be able to be more competitive in a national and global economy. According to Rock Falls, the Staff Report recognizes the social and economic benefits of competition and the availability of high speed broadband service in connection with their assessment of other projects. Those benefits are the same for Rock Falls.

Rock Falls opines that its current project will allow for advanced telecommunications services to many small businesses, and therefore Rock Falls’ proposed project fully complies with the statute and the ICC Rules. According to Rock Falls, in recommending denial of Rock Falls’ Grant Application because the City’s proposed project does not extend to residential customers, the Staff misreads and misinterprets the language in the statute and ICC Rules. Rock Falls argues that the Staff Report incorrectly states that “Section 13-301.3(b) of the Act uses the terms ‘residential and small business’ entities in its description of end users.” The statute and ICC Rules use the terms “residential or small business end users”. (Emphasis added by Rock Falls.) Rock Falls states that while residential areas are not targeted at the present time, it is anticipated that future projects will expand Rock Falls’ fiber network to allow for advanced telecommunications services to be provided to residential customers.
ROC-NET

ROC-Net asserts that its response to the request for proposals addressed each of the criteria set out by the Commission and demonstrated that ROC-Net should be awarded a grant under the Digital Divide Infrastructure Elimination Fund.

ROC-Net disputes the position ITA took on its application. ROC-Net states that while the ITA complained that the applications were lacking information, the ITA had not specified what information was missing.

According to ROC-Net, ITA’s primary objection to ROC-Net’s application is that the ITA believes ROC-Net’s schedule is too ambitious. ITA listed eight activities that must be completed during a short time period and argues that these cannot be accomplished in the timeframes set by ROC-Net.

ROC-Net argues that ITA is wrong, primarily because it fails to understand the steps that have already been taken by ROC-Net and the technology and network ROC-Net plans to use for its proposed service. ROC-Net notes that ITA acknowledges that ROC-Net has a track record of deploying fixed wireless in Rockford. ROC-Net argues that its experience allows it to understand the tasks that must be accomplished and the timelines necessary to complete those tasks.

ROC-Net states that reviewing each of the eight steps pointed out by ITA, it is apparent that ROC-Net is well on its way to meeting its timelines because it has been active while waiting for Commission approval of its proposal. ROC-Net states that it has already identified dark fiber in the ten county area and all of the necessary Irrevocable Rights of Use for dark fiber have been negotiated and are at various stages of acquisition. The Network Operations Center of ROC-Net has already identified the requirements for operation and has begun the process of purchasing necessary hardware and software to make the dark fiber operational. According to ROC-Net, it already has much of the necessary equipment on its network. Several points of presence have already been negotiated and five of those already have power and rooms built out ready for service. Two of those are already in use and a third is scheduled for use next month. ROC-Net has already identified the microwave towers it needs for its service and is working on mapping the tower assets for each county.

ROC-Net argues that accepting satellite service as an alternative provider of high speed service would scuttle the whole digital divide program because satellite service is ubiquitous in Illinois and could be utilized to provide broadband services everywhere. ROC-Net further argues that the legislature must be presumed to have been aware of the satellite alternative but to have rejected it in authorizing digital divide funding.

According to ROC-Net, ITA had incorrectly argued that ROC-Net needs to obtain a certificate of Service Authority in order to negotiate interconnection agreements with dominant carrier in its area. ROC-Net notes that ITA has ignored the Commission’s order in Docket No. 05-0792, entered on March 8, 2006. ROC-Net also notes that although it has certificates of service, they are not necessary because its network design does not require it
to interconnect with the dominant LEC.

Contrary to the allegation of the ITA, ROC-Net states that its application is appropriately scaled to provide service to small rural communities in Winnebago County that are currently underserved.

Finally, ROC-Net also responded to the ITA’s recommendation that a performance bond be required by arguing that the Commission was without authority to impose conditions on the acceptance of a digital divide grant.

EGYPTIAN INTERNET SERVICES

Egyptian Internet Services filed its Initial verified comments on June 1, 2006. In those comments, EIS reiterates that it sought a grant of in order to build out a wireless broadband service to serve residential and small business users in four small southern Illinois communities and their surrounding areas. EIS agrees with the Staff Report recommendation to fully fund the requested amount. In order to avoid the incurrence of further costs, EIS indicated its intention of not filing Reply Comments or a Draft Order in this proceeding.

CLEARWAVE COMMUNICATIONS d/b/a DELTA COMMUNICATIONS

Clearwave Communications d/b/a Delta Communications, applauds the Staff recommendations and urges the Commission to approve Delta’s grant request. According to Delta, its application meets all of the requirements of the RFGP and the grant money will be used by Delta to deploy additional broadband service in underserved areas. Delta requests the Commission to adopt the Staff’s recommendation to award Digital Divide Elimination Infrastructure Funds to Delta as set for in the Staff Report.

Delta takes exception with not only ITA’s role in this proceeding but also with what it considers to be the meritless arguments set forth by ITA. Delta and others asserted that the participation of the ITA would transform these proceedings into an adversarial contest which would: 1) unduly delay the construction of the proposed broadband projects; 2) further delay the actual deployment of additional broadband in underserved areas; and 3) unnecessarily increase the cost to the applicants of obtaining the grant funding.

According to Delta, ITA boldly asserts that the “litigational aspect” of this proceeding commenced with Staff’s Report. Delta argues that contrary to ITA’s assertion, the Legislature did not establish the grant application process as an adversarial proceeding, and the Legislature explicitly required the selection process to adhere to the requirements of the non-adversarial Illinois Procurement Code 220 ILCS 5/13-301.3(c). Delta maintains, as the ITA admits by its reference to the litigational nature of this proceeding, it has succeeded, to a large extent, in converting this process into an adversarial struggle. According to Delta,
ITA’s recommendations to reject all applications and undertake the grant application anew will cause unnecessary delays and should be summarily rejected by the Commission.

According to Delta, satellite service is not a viable alternative to broadband. ITA’s initial concern was Staff’s rejection of satellite service as a competitive broadband service. ITA’s apparent goal is to delay the DDEIF process, and that is illustrated by its argument that DDEIF grants are not needed because satellite providers have filled in the digital divide. ITA touts the ubiquity of satellite service and concludes that Staff was wrong to discount satellite services as a viable alternative to broadband. ITA also claims that Staff’s conclusion was without reference to any authoritative source and amounts to speculation and surmise. Delta asserts that ITA concludes, then, that the Commission should reexamine all of the grant requests in light of existing satellite providers.

According to Delta, ITA simply disagrees with Staff’s conclusion that satellite service is not a viable option to broadband due to its technical limitations and cost considerations and to the extent that the Staff’s rejection of satellite service was “speculation and surmise”, ITA has conveniently filled in the facts. Delta views ITA to describe Wildblue Satellite Service as offering competitive charges for broadband service. Wildblue’s satellite offerings cost $49.95 to $79.95 per month and Wildblue requires the customer to invest in $299.00 in equipment (ITA Ex. 1). These prices and costs are in no way “competitive charges” with the prices submitted by Delta.

According to Delta, its proposed pricing plans, as disclosed in its grant application, are significantly lower than satellite services. Delta’s proposal allows the customers to choose different pricing options based upon the amount of bandwidth the customer needs for residential or business use. These pricing options are not available from satellite providers. Delta argues that if it were true that satellite service exists at competitive charges, then everyone in rural Southern Illinois who wanted broadband service would already have it. In Delta’s opinion, the problem of the digital divide has not been eliminated as the ITA would have the Commission believe. Satellite costs are a prohibitive barrier to digital service to many in rural Illinois, and the Staff was correct in rejecting satellite service as a realistic broadband offering.

Delta argues that ITA’s criticism of the Staff’s use of varying population density figures by the applicants also lacks merit. According to Delta, contrary to ITA’s argument, the failure to require such uniform information does not require a second submission of grant applications. Delta maintains that it submitted extremely detailed demographic information in its application. ITA’s hypercritical comment regarding differing population density figures underscores its obstructionist goals.
Delta also disputes ITA’s criticism that the absence of market surveys calls into question the economic viability of the applications. ITA now seeks to impose a market survey or study requirement on applicants, “to determine pricing for services and take rates for them.” Seven existing businesses and two not-for-profit municipal entities were recommended for grants. Each applicant has to invest at least four (4) times the amount of the grant money it will receive. Delta is familiar with its proposed service area and it is taking the business risk of success or failure. However, according to Delta, ITA has no monetary investment in any broadband business nor has it submitted an application for grant funds in the present process. ITA seeks to disqualify all applicants by changing the rules after the process has begun and ITA’s criticism is aimed at impeding the deployment of broadband services in rural Illinois. There is no merit to ITA’s proposal to require a market survey for grant funds.

Delta also disputes ITA’s allegation that some of the applications were deficient with financial information. In order to adhere to the Staff’s requirements, Delta furnished highly sensitive detailed competitive financial information, including pricing, its annual sales, its most recent income statement and balance sheet, and statement of cash flows. To the extent that other applicants did not comply with this requirement, their application may not be in compliance with the application process. According to Delta, its application meets all the requirements of the statute (220 ILCS 5/13-301.3), the Commission’s rule (83 Ill.Admin.Code 759), and the Staff’s RFGP, and Delta’s grant should be awarded.

Delta takes issue with ITA’s contention that seven out of 10 counties are listed in the project area for Heartland and are also listed in the Delta’s proposed service area. Delta maintains that its proposal for these seven counties is inextricably interrelated with implementing integrated technologies over a significant service area of Southern Illinois. According to Delta, from a construction standpoint and feasibility standpoint, it cannot complete its construction by breaking the continuity of the service backbone. Even if Heartland’s application overlaps with Delta’s for service to these 7 rural Southern Illinois counties, the 7 counties are so underserved that it is still good public policy to fund both applications. However, in Delta’s opinion, to the extent that the Commission determines that only one application should be granted, Heartland did not submit the financial information required in the RFGP and therefore, Delta’s application should be favored over Heartland’s to serve these seven counties.

Delta criticizes the ITA’s bonding proposal in this proceeding as well. According to Delta, the ITA’s suggestion reflects either a fundamental lack of understanding of the requirements in 83 Ill.Admin.Code §759 or it highlights ITA’s obstructionist goals. In Delta’s opinion, the purpose of bond is to protect state funds in the event of default. There is no basis to require a performance bond as a source of protection for the state, because the way the grant process operates more than adequately protects the state from a default. Delta asserts that the
RGFP provides that in no event will a successful applicant receive a grant reimbursement for more than 25% of the eligible project costs. Moreover, 83 Ill. Admin. Code 759.330(d) provides for the gradual disbursement of funds in stages to the grantee as the construction progresses. Therefore, according to Delta, since every grantee must spend at least 4 times the amount of the grant award and it receives the grant funds only as a reimbursement, there is absolutely no purpose to be served by a bond. Given the nature of the grant funding procedures in place, the state is never in jeopardy. A bond would simply increase the costs of construction and further deter applicants from seeking funds from the DDEIF.

Additionally, Delta argues that it appropriately eliminated resellers in evaluating the true level of competition, which the ITA took exception to and called “absurd.”

Delta asserts that its application described in detail the number of broadband providers in each area, including resellers. Delta’s application also stated:

Also, please note the important distinction between facilities based providers and re-sellers when considering the level of true competition in a given market. Resellers have limitations in providing competition due to the following reasons: A) their wholesale pricing is set by the entity in which the reseller purchases [its] access from, thus due to margin constraints limits their pricing flexibility when competitive forces drive consumer prices down, and B) service level (speed) offerings are limited by the entity in which the reseller purchases [its] access from, again, limiting any competitive advantage available in offering superior access plans to those offered by competing providers. Therefore, when evaluating the true level of competition in an area, we have negated a reseller’s presence and are strictly focusing our attention on facilities based providers (Delta grant proposal @ 27).

According to Delta, ITA further alleged that if resellers were considered, there would be fewer underserved communities.

Delta states that it is a reseller of telecommunications services and fully understands the pricing and service limitations of resellers. Despite the ITA’s protests, resellers cannot offer robust competition because the quality and speed of service is limited to that of whatever the underlying carrier allows the reseller to sell. Moreover, Delta opines, resellers are severely limited to the price options offered to them by the underlying carrier in reselling the service to the public.
According to Delta, awarding grants for the capital construction of broadband services is the primary purpose of the DDEIF. There is a reason why the fund is called the Digital Divide Elimination Infrastructure Fund (emphasis added by Delta). The Legislature was well aware of the existence of resellers and their limitations when it established the DDEIF to stimulate capital investment of broadband in the underserved areas. In Delta’s opinion, it was correct in eliminating resellers from the evaluation process.

Delta also takes issue with Verizon’s policy argument that would use funding from the DDEIF for projects that are already completed. According to Delta, the goal of the DDEIF is to encourage construction of high-speed broadband services to underserved areas. The DDEIF was not established to dispense funds for projects that have already been completed. 220 ILCS 5/13-301.3 establishes the DDEIF “to fund” the construction of facilities specified in the Commission’s rules. Delta states that 13-301.3(a) also provides that any entities seeking funds shall demonstrate to the Commission that the grant “shall be used” for the construction of high-speed data transmission facilities. Delta further states that 13-301.3 means that the DDEIF is not to be used for projects already completed. 83 Ill.Admin.Code 759.110 declares the purpose of the fund for grants, “to fund the construction of high-speed data transmission facilities in the state. . . .” This stated purpose is in the future tense. The policy against retroactive funding is clear, according to Delta. Delta opines that Verizon’s applications were rejected for that reason.

Delta maintains that the protracted nature of the grant process has raised a related issue. Delta views Staff as being appropriately concerned that undue delays in the grant award process only serve to deter further applicants and further delay the Legislature’s goal of eliminating the digital divide. The litigation tactic delays incurred in this proceeding have disrupted all applicants’ detailed construction plans submitted to the Staff. Delta asserts that while the Commission will not award grants for construction completed before the applications were submitted, applicants should be allowed to begin construction of their projects after the grant proposals are submitted without disqualifying those projects from funding, especially since the grants are administered as reimbursements. According to Delta, allowing construction of the projects to begin immediately after the grant proposals are filed would make for more efficient use of the construction season so that the contested nature of the grant process does not hinder deployment of broadband. In the instant case, even after the Commission reaches a decision in awarding grants, there is a possibility of a petition for hearing and a potential appeal. The construction process should proceed without requiring applicants to await that outcome. Delta argues that future grants must adopt a more streamlined process.

Finally, Delta disagrees with the Princeton and Rock Falls assertions that funding should be delayed until all applicants are determined because there is a possibility that those
applicants who were not recommended for funding may ultimately be recommended for funding and the availability of funds on a global basis may be compromised. According to Delta, there is no reason to delay the awarding of grants or to reduce Delta’s grant request.

VERIZON AVENUE CORP

According to Verizon Avenue, in its March 28, 2006 “Telecommunications Division Staff Report,” Staff recommended denial of Verizon Avenue Corporation’s DDEIF applications for funding for “wireless to the rooftop” services to underserved areas of southern Illinois on two grounds: (1) that one alternative broadband provider already existed in Chatham, Highland and Rantoul, the three communities covered by Verizon’s applications; and (2) project costs had been incurred “prior to grant agreement.” Yet, Staff noted that “Verizon Avenue is without question well-qualified to construct facilities of the type sought,” and is “authorized by statute to receive grant funds.”

In its June 5, 2006 Verified Initial Comments, Verizon identified what it believes to be several inconsistencies in Staff’s treatment of Verizon’s DDEIF applications as compared to those of other DDEIF applicants. First, Verizon contends that its applications met the applicable “under-provided” or “underserved” criteria to a greater degree than some applications for which Staff recommended approval. Specifically, several communities encompassed by Delta, Heartland, IREC and USAB applications are considerably larger and more economically diverse than what one would typically consider rural, and would not be considered “under-provided”/underserved. (Verizon Comments at 5). For example, based on Verizon’s research, Carbondale has six alternative providers of high-speed data transmission services (Clearwave, Verizon, MediaCom, MyChoice, Local Link, Neon DSL, and ShawneeLink), Marion has seven (Clearwave, Verizon, MediaCom, MyChoice, Local Link, Neon DSL, and ShawneeLink); Bloomington has seven (Verizon, Insight Cable, Comcast, Charter Communications, Clearwave, Insight Media, and MediaCom).

Second, although Staff recommended rejection of Verizon’s applications because of the existence of a single alternative broadband provider in the relevant communities, Verizon points out that Staff recommended approval of a number of DDEIF grant awards that would allow applicants to serve areas where multiple providers of high-speed data transmission services are already offering competitive services.

According to Verizon, virtually all of the cities Delta proposes to serve already have at least one provider of broadband services, and the vast majority of those cities already have two or more such providers. IREC’s application identifies five alternative providers in the territories covered by its application – Winco, Adams Network, Cass Communications, Mediacom and Verizon. (Id. at 8). Yet, according to Verizon, the Staff Report concluded, without analysis, that
“IREC’s proposal covers an area of Illinois not addressed by any other grant proposal, and appears to be underserved.” The City of Sullivan’s application discloses the existence of two alternative providers within the territory it wishes to serve, a wireless internet provider offering broadband service, and a CATV provider. USAB cites at least three other providers operating in the territory it proposes to serve in its grant application, and states that it expects to see other wireless broadband providers enter select areas of the state. (Id.). Yet, Staff recommended that the Commission approve all of these applications as meeting the “under-provided”/underserved criterion.

Based on the applications for which Staff has recommended approval, the criteria for deeming an area “under-provided”/underserved have not been applied consistently in analyzing the Verizon applications. Verizon, therefore, urges the Commission to apply the same standard consistently as to all applicants, pointing out that if the Commission did so, it must find that Verizon’s applications also would serve “under-provided”/underserved areas.

Verizon’s Comments also address what Verizon deems to be Staff’s inconsistent approach to “retroactive funding” of DDEIF grant applications. While Staff stated that it was “not convinced that it is sound policy to retroactively fund projects that are already completed,” Verizon opines that good public policy supports permitting applicants to seek DDEIF grant awards for projects that are already underway.

Verizon maintains that applicants with a reasonable hope of obtaining DDEIF funding assistance and who might otherwise have embarked immediately on projects that would bring new high-speed data transmission facilities to underserved areas of the state might delay such efforts in order to pursue DDEIF grants and obtain a decision thereon before expending resources even on the planning stages of such projects. According to Verizon, this would be contrary to the fundamental purpose of the DDEIF, which is to bring such services to underserved areas now, as opposed to years down the road.

Verizon also notes the “spend first, reimburse afterwards” process set forth in 83 Ill. Admin. Code Part 759, and reminds the Commission that the RFGP that instituted the DDEIF grant award process was a work in progress for nearly a year.

As stated in Verizon’s comments, representatives from Verizon and Staff discussed the anticipated timing of the issuance of the RFGP on several occasions. Based on those discussions, Verizon had every belief that the RFGP would issue prior to the completion of the projects in Chatham, Highland, and Rantoul. Verizon therefore proceeded to commence its work on those projects so that the residents in the underserved communities could realize the benefits sooner rather
than later. Unfortunately, the RFGP was delayed, and Verizon completed work before the application process ended. Verizon urged the Commission not punish Verizon for timing issues that were out of its control.

Verizon asks the Commission to recognize that Staff recommended approval of the City of Sullivan’s proposal, and that proposal relied heavily on construction that had already been completed. According to Verizon, there is no cause to reject Verizon’s DDEIF grant application due to retroactive funding concerns when the City of Sullivan’s application was granted under similar circumstances, particularly given that Verizon’s total DDEIF grant request was less than the award granted to the City of Sullivan.

Verizon’s Comments stated that Staff’s reasons for denial of Verizon’s applications were inconsistent with the reasons Staff cited for the denial of other applications. Staff recommended denial of two applications because there were already multiple providers of high speed data transmission services in the relevant markets. Staff recommended denial of two other applications because those applicants had failed to provide the details required by the RFGP. The remaining recommended denial was attributed to the fact that a partner of the applicant had been recommended to receive approximately $1 million in DDEIF funds. According to Verizon, its applications suffered from none of these infirmities, and were denied nonetheless. Lastly, Verizon argues that there are ample DDEIF funds available to award Verizon its requested grant monies without jeopardizing the other recommended awards.

Verizon also takes issue with Staff’s assertion in its June 16, 2006 Verified Reply Comments that “Verizon did not provide any instance where Staff recommended retroactive funding of completed projects,” and pointed out that Staff had recommended rejection of the City of Princeton’s DDEIF application, which sought “retroactive funding.” However, according to Delta, Staff ignored Verizon’s discussion of the City of Sullivan application, which relied heavily on already-completed construction, just as the City of Princeton’s proposed project did. Yet, Staff recommended approval of the City of Sullivan’s DDEIF grant application.

According to Verizon, Staff made no effort to distinguish the two applications, only underscoring Staff’s inconsistent application of the DDEIF evaluation criteria. Staff did not attempt to refute Verizon’s discussion of the detailed factual support for Verizon’s contention that Staff had inconsistently interpreted and applied the “under-provided”/underserved standard. Instead, Staff claimed that Verizon failed to “show where the underserved status has been applied inconsistently between large expansive proposed territories with unserved or underserved areas, and small towns and communities that already have contiguous service.” Staff also asserted that “Verizon also overlooked the fact that all criteria were applied to all proposals in the context of bringing the benefits of high-
speed data transmission service to eligible underserved areas of the state,” without explaining how this would undermine Verizon’s discussion of Staff’s inconsistent treatment of the import of the existence of alternative providers of high speed data transmission services in the territories to be covered by the DDEIF grant applicants’ proposals. According to Verizon, by definition, all DDEIF evaluation criteria are applied “in the context of bringing the benefits of high-speed data transmission service to eligible underserved areas of the state.” Verizon argues that this overarching context does not justify Staff’s inconsistent application of the relevant criteria.

Verizon also complains that Staff disagreed with Verizon’s policy discussion regarding what Staff has termed “retroactive funding” without acknowledging or addressing the unique facts of Verizon’s situation, wherein Staff had advised Verizon that the RFGP would issue before Verizon’s DDEIF project construction was completed. Yet, according to Verizon, through no fault of Verizon’s, the RFGP’s issuance was so delayed that Verizon completed construction prior to the RFGP becoming available, even though Staff had advised Verizon that this would not happen.

Finally, Verizon concurs in ITA’s recommendations regarding a bond requirement. Verizon posits that it is appropriate for the Commission to take measures to ensure that the DDEIF funds disbursed through the award process are used properly, and that the projects for which they were awarded actually come to fruition. Because this is the first DDEIF grant award proceeding, the Commission should take measures to set useful precedent for future proceedings. Verizon argues that a bond requirement is an appropriate condition for the protection of the DDEIF funds that are awarded.

V. Staff’s Verified Reply Comments

Staff filed Verified Reply Comments in response to those filed by Egyptian Internet Services, City of Rock Falls, City of Princeton, Illinois Telecommunications Association, Verizon Avenue, ROC-Net Holdings, the Illinois Rural Electric Cooperative, and USA Broadband. Staff had no objection to the comments filed by Egyptian, IREC, and USA Broadband. The Staff further changed its recommendation with respect to the City of Rock Falls, recommending that the proposal be funded, base upon Rock Falls’ representation that a large number of small businesses would be able to take service using the proposed facilities.

With respect to both the City of Princeton and Verizon Avenue, the Staff argues that the purpose of the DDEIF is to fund infrastructure prospectively, rather than already-completed projects. It notes that Section 13-301.3 provides that DDEIF grants are intended to: “fund … the construction of facilities specified in Commission rules adopted under this Section[.]” 220 ILCS 5/13-301.3(a). Further, the Commission is to disburse grants “for the
construction of high-speed data transmission facilities in eligible areas of the State.” 220 ILCS 5/13-301.3(b). These provisions, as Staff sees it, clearly contemplate funding projects that have not been constructed yet. This is, according to Staff, consistent with the notion that the fund exists precisely because there are areas with no or few broadband facilities, which is far less likely to be true in the case of an area where facilities have already been built and already exist.

Staff sees the ITA’s involvement in this proceeding as calculated chiefly by a desire to frustrate the goals and objectives of the DDEIF; Staff sees the ITA’s challenge to proposals with the largest dollar values as evidence of this. Staff states that it understands that an association representing investor-owned local exchange carriers will not be sympathetic to any public sector attempt to stimulate broadband deployment, and notes that the decision to grant ITA intervenor status, while probably unavoidable, is unlikely to result in anything of the slightest aid to the Commission’s decision in this proceeding other than references to musical comedies. Staff further notes that that ITA has, in the past, attempted to use Commission proceedings to frustrate or limit entry into the telecommunications market by entities other than investor-owned companies, referring the Commission to the in City of Naperville: Application for Certificates of Service Authority to provide facilities-based and resold local exchange and interexchange telecommunications services, or in the alternative, Request for Declaratory Ruling that no such Certificates are required for the City of Naperville to provide the proposed facilities and services, Docket No. 03-0779 (September 9, 2004). Staff further notes that, in making its recommendations, it is carrying out a Commission directive to implement a statute that the Commission is charged with administering.

Staff understands the ITA to challenge the viability of proposals received from Heartland Communications, Clearwave Communications, ROC-Net, and USA Broadband-EI. Staff’s review of these sections indicated that no change to Staff’s original recommendation is either necessary or warranted.

Staff notes that the ITA challenges Staff’s position on satellite service, stating that Staff was simply wrong to discount satellite service as an alternative to broadband. As an initial matter, Staff notes that satellite service was available prior to the DDEIF legislation. Presumably, opines Staff, the General Assembly was aware of its availability prior to determining that the DDEIF program was needed.

Regarding ITA’s reference to Wildblue specifically, Staff observes that Wildblue’s website indicates that its service requires a 12 month contract. If a consumer seeks to
terminate service prior to the 12 month contract, the consumer must pay the remainder of the 12 month’s fees, which would be a problem to some consumers. The Wildblue equipment cost is $299, which again appears to the Staff to be a barrier to some consumers. The Wildblue installation charge of $179 may also be considered a barrier by some consumers. Regarding latency, Staff observes Wildblue’s website to state as follows:

What is the impact of latency? Can I play real-time Internet games or make Internet phone calls on your service?

The WildBlue system is engineered to help offset the impact of latency, which is the delay caused by sending signals from the earth to the satellite and back again. However, there is a delay of about a half second as the signal travels up to the satellite, back down to the gateway, up to the satellite and back down to your modem. For most applications this latency does not affect performance, however, there are some applications like voice over IP (telephone service delivered over the Internet, also known as VoIP), or real-time interactive gaming, where latency will have a noticeable effect on performance over the WildBlue network, as it would on any satellite-delivered service.

Accordingly, Staff observes that if a consumer wants broadband service to use VoIP telephone service, or real time applications such as on-line gaming, Wildblue is not a viable choice. In this regard, Staff states that any satellite broadband service is not a viable alternative to the broadband providers recommended by Staff in this proceeding.

Finally, Staff points out that Wildblue, like any satellite service, is susceptible to service degradation due to weather. Wildblue’s website states as follows:

Is the WildBlue service affected by weather?

The WildBlue service is only minimally affected by weather, and only under extreme conditions. The WildBlue service will offer availability equal to that of satellite TV. Like satellite TV services, during a very heavy rainstorm, you may notice slower WildBlue speeds, but this should normally only last a few minutes.

According to Staff, these defects underscore Staff’s conclusion that satellite broadband service does not yet represent a viable alternative to the broadband service proposed by the recommended applicants. ITA’s arguments regarding this issue should be
Staff sees ITA to further complain that Staff used population density figures “for illustrative purposes only,” and that Staff’s recommendations therefore constitute a violation of Section 759.230(a)(2).

Staff asserts that ITA misunderstands what Staff meant when it used the term “for illustrative purposes only.” Staff’s report presented a population density metric, typically residents per square mile, but Staff did not intend for those metrics to be used on a specific, apples-to-apples comparison basis. Staff used its judgment regarding the proposed service territory and population in that territory to address the “low population density” requirement in Section 759.230(a)(2). According to Staff, it did not select an arbitrary number and utilize the population density metric as a deciding criterion.

Staff does not believe there is an issue regarding population density in this proceeding. Supporting this belief is the observation that for the five recommended applicants that ITA challenged, at no point did the ITA state, or even suggest, that population density was too high to qualify for a grant award. The population density issue further confirms the conclusion that the ITA’s goal in this proceeding is not consistent with the goals and objectives of the DDEIF law. According to Staff, the Commission may be assured that Staff does indeed take the disbursement of $4,611,083 of public funds very seriously.

Staff observes that ITA repeatedly, and without any real evidentiary basis for doing so, questions the truthfulness of the applicants' proposals or the adequacy of Staff’s review. As noted by Staff, ITA makes no showing that applicants have been deceptive, and the Staff, accordingly, does not share ITA’s belief that each applicant should be required to execute and file with the Commission a performance bond equal to the amount of funding each applicant receives. Staff notes that, by definition, applicants for DDEIF grants are in need of money. Any requirement that they commit additional resources in order to receive DDEIF funding is tantamount to requiring a starving person to produce food before being able to receive food aid. If they have it, they don’t need it. According to Staff, under the ITA’s proposal, if the applicants don’t have money, they don’t get money - an inappropriate Catch-22, and one that neither the General Assembly nor the Commission thought necessary when enacting the statute and rules governing DDEIF grants.

Staff believes that contract consummation, as well as Staff’s oversight of project milestones, provide adequate assurance to the ICC that DDEIF funds are appropriately expended. Staff fully intends to actively monitor the progress of these grant awards. If a project has not met its milestone,
Staff will not authorize distribution of funds to the grant award recipient.

With respect to ROC-Net, Staff notes that it remains concerned that key elements of the project are as yet unresolved. Staff, nonetheless, is of the opinion that these matters can be resolved by inclusion of appropriate provisions in the Grant Agreement, which would specify the locations of facilities, the lessors thereof, and the agreement, such as Indefeasible Rights of Use, by which ROC-Net will obtain use thereof. Staff states that it looks forward to working with ROC-Net to complete the project.

VI. Commission Analysis & Conclusion

As an initial matter, we observe that the Commission’s efforts and ultimate objective in this proceeding are governed by both statute and administrative rule. The Commission, therefore, opines that both the applicable statute and Code Part afford us, and indeed require us, to exercise a degree of discretion in determining whether to award grants, and which applicants to make awards to. We note that the General Assembly left us to determine what constitutes a low population density, under-provision of services, and a lack of a market for services.

Having established that the Commission enjoys broad discretion in awarding these grants to qualified Applicants, we concur fully in Staff’s recommendation that Section 13-301.3 does not afford us the discretion to distribute funds to projects that have already been completed. The specific language of the statute, as well as the obvious intent of the General Assembly, convinces us that the DDEIF is intended to fund infrastructure projects prospectively, not retroactively. Accordingly, we adopt the Staff’s recommendations with regard to this threshold matter, and therefore conclude that the City of Princeton proposal, and the three Verizon Avenue proposals, cannot be funded.

With respect to the proposals submitted by Clearwave Communications LLC d/b/a Delta Communications; Egyptian Internet Services, Inc.; Heartland Communications Internet Services, Inc.; Illinois Rural Electric Cooperative; Mt. Vernon.Net; Northern Illinois Technology Triangle; City of Sullivan; City of Rock Falls; USA Broadband-EI, LLC; and ROC-Net Holdings, LLC, we adopt Staff’s recommendations in their entirety. Specifically, we find that each has a certificate of service authority, or has demonstrated that it possesses the technical, managerial and financial resources and abilities to construct the facilities here at issue. We further find that each project, as described in its respective proposal, and as analyzed in the Staff Report or Staff Reply Comments, seeks to build facilities in an area that is (a) under-served for small business and residential customers; (b) in which a competitive market has yet to develop for such
customers; and (c) has a low population density. We further find that each seeks funding for eligible uses.

Commission Staff also recommended conditional approval of two proposals: (1) the Illinois Rural Electrical Cooperative; and, (2) ROC-Net Services. We adopt Staff’s recommendations with regard to those two projects as well, and hereby condition our approval of those projects upon each applicant’s satisfaction of Staff’s concerns, as specifically delineated in the Staff Report and Staff Reply Comments. In the event that either conditional recipient is unable to satisfy Staff’s concerns within 90 days from entry of this order, we direct that the grant to such conditional recipient be revoked by operation of law, without further Commission action.

In a related matter, we fully agree with and are in support of Staff’s statement in its Reply Comments that careful oversight of contracts concluded under this order is warranted and will take place. The Commission, therefore, takes this opportunity to put successful applicants on notice that we will fully support our Staff’s contractual monitoring efforts, and therefore expect the fullest cooperation from successful applicants.

Finally, with respect to the Comments of the ITA, we note that the General Assembly has charged the Commission with administering the DDEIF, and subsequently distributing the appropriate grants. The Commission views the ITA’s comments in this proceeding as essentially challenging the wisdom of establishing the DDEIF, and the care taken by Staff in undertaking the review of the submitted proposals. The Commission notes that the former matter, being a lawful enactment of the General Assembly, in force and effect, is not open to challenge here. As to the latter, we find no lack of care or caution in Staff’s efforts to review and make appropriate recommendations in this proceeding. Staff very clearly understands the need to monitor grant awards with care, which we view as obviating the ITA’s concerns.

As for ITA’s suggestion that a bonding requirement be imposed on successful Applicants, we agree with Staff and reject that approach. The Commission finds that requiring the entities that applied for funds to post money upfront is not only unduly burdensome, but goes against the very spirit and purpose underlying the creation of the DDEIF and this subsequent proceeding.

To conclude, we hereby direct that the following proposals be adopted and fully funded: (1) Clearwave Communications LLC d/b/a Delta Communications; (2) Egyptian Internet Services, Inc.; (3) Heartland Communications Internet Services, Inc.; (4) Illinois Rural Electric Cooperative; (5) Mt. Vernon.Net; (6) Northern Illinois Technology Triangle; (7)
We direct Staff to execute Grant Agreements, in substantially the form set forth in the RFGP, on the Commission’s behalf with each such applicant, to monitor contract compliance of each applicant with each such Grant Award, to resolve conditional approval matters that we have noted in this order, and to report to us as needed regarding this matter.

VII. Findings & Ordering Paragraphs

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

1) The Commission is authorized and required by law to evaluate and award grants from the Digital Divide Infrastructure Elimination Fund;

2) The Commission, having previously directed the issuance of a request for proposal, received seventeen proposals;

3) The proposals in question have been duly reviewed by the Commission Staff, which has in turn filed, on March 28, 2006, a Staff Report recommending Commission approval and full funding of nine such proposals: specifically, (a) Clearwave Communications LLC d/b/a Delta Communications; (b) Egyptian Internet Services, Inc.; (c) Heartland Communications Internet Services, Inc.; (d) Illinois Rural Electric Cooperative; (e) Mt. Vernon.Net;(f) Northern Illinois Technology Triangle; (g) City of Sullivan; (h) USA Broadband-EI, LLC; and (i) ROC-Net Holdings, LLC;

4) The Staff has further, in Reply Comments filed on June 16, 2006, recommended Commission approval and full funding of a ninth proposal, that of the City of Rock Falls;

5) The Staff has recommended that two of the proposals, those of the Illinois Rural Electric Cooperative and ROC-Net Services be conditionally approved;

6) The Staff has recommended rejection of all remaining proposals;

7) Leave is also hereby granted for Yamaha to withdraw its Application;
8) The Staff’s recommendations should be approved and adopted in their entirety;

9) The Staff should be directed to enter on the Commission’s behalf into Grant Agreements, in substantially the form set forth in the RFGP, with each successful applicant, to monitor performance of each applicant pursuant to such Grant Awards, to resolve conditional approval matters that we have noted in this order, and to report to us as needed regarding this matter.

IT IS THEREFORE ORDERED THAT the Grant Proposals of the following entities are hereby adopted, approved and fully funded: (a) Clearwave Communications LLC d/b/a Delta Communications; (b) Egyptian Internet Services, Inc.; (c) Heartland Communications Internet Services, Inc.; (d) Illinois Rural Electric Cooperative; (e) Mt. Vernon.Net; (f) Northern Illinois Technology Triangle; (g) City of Sullivan; (h) USA Broadband-EI, LLC; (i) ROC-Net Holdings, LLC; and (j) City of Rock Falls;

IT IS FURTHER ORDERED THAT all other proposals are rejected:

IT IS FURTHER ORDERED THAT Staff shall enter on the Commission’s behalf into Grant Agreements, in substantially the form set forth in the RFGP, with each successful applicant, shall monitor performance of each applicant pursuant to such Grant Awards, shall resolve conditional approval matters that we have noted in this order, and shall report to us as needed regarding this matter; provided however, that in the event that either conditional recipient is unable to satisfy Staff’s concerns by 90 days from entry of this order, the grant to such conditional recipient shall be revoked by operation of law, without further Commission action.

IT IS FURTHER ORDERED that this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 19th day of September, 2006.

(SIGNED) CHARLES E. BOX

Chairman
[1] A non-active intervenor was Pat Quinn, Lieutenant Governor of the State of Illinois (filed on April 12, 2006). Illinois Bell Telephone Company ("AT&T Illinois") also filed a Petition to Intervene (filed on March 23, 2006) which was denied by the ALJ. AT&T Illinois subsequently filed a Petition for Interlocutory Review of that ALJ decision which it ended up withdrawing after being granted leave to file an Amended Petition for Intervention. AT&T Illinois ultimately withdrew as a Petitioner from the matter in its entirety on April 26, 2006.

[2] On April 19, 2006, Staff filed a Motion to Take Administrative Notice of Yamaha of Southern Illinois, Inc.'s Desire to Withdraw Its Proposal. At or around the time of the filing of the Staff Report, the owner of Yamaha, Ben Moore, contacted Staff counsel and indicated that he wished to withdraw the Yamaha proposal, in light of his understanding that other eligible entities had sought grants for the purpose of constructing facilities in the same area that Yamaha sought to serve. Mr. Moore stated that, inasmuch as his goal was chiefly to obtain broadband service in his community, and that such need appeared likely to be met by other entities, neither he nor Yamaha had any wish to continue to advance the Yamaha grant proposal.

[3] According to ITA, it is unrealistic for Roc-Net to suppose that it will, within a 45-60 day period: (1) identify suitable technologies for use in a multi-county area; (2) sign Irrevocable Rights of Use for any that technology found; (3) identify, design, and contract for fiber cabling including acquiring rights-of-way; (4) order all fiber optic equipment; (5) petition the Illinois Commerce Commission and receive a Certificate of Service Authority in order to obtain an interconnection agreement with a dominant LEC; (6) identify sites for construction of facilities; (7) negotiate interconnection agreements and receive Illinois Commerce Commission approval; (8) identify an unspecified number of microwave tower locations and contract for them.