

Anna Gomez - RE: JANCO Partners Inc. Objection to "Sale or Lease of Project Assets" Provision in Notice of Funds Availability Issued July 2, 2009

From: "Ray Hernandez" <Rhernandez@janco.com>
To: <agomez@ntia.doc.gov>
Date: 7/29/2009 1:25:00 PM
Subject: RE: JANCO Partners Inc. Objection to "Sale or Lease of Project Assets" Provision in Notice of Funds Availability Issued July 2, 2009

Dear Ms. Gomez,

On July 2, 2009, the Departments of Agriculture and Commerce issued a Notice of Funds Availability ("NOFA") for broadband initiatives established pursuant to the American Recovery and Reinvestment Act of 2009 (the "Act"). Section IX(C)(2) of the NOFA (the "Sale Provision") addresses the sale or lease of award-funded broadband facilities and reads as follows:

Sale or Lease of Project Assets. The sale or lease of any portion of the award-funded broadband facilities during their life is prohibited, except as provided herein. The agencies may approve a sale or lease if it is (a) for adequate consideration; (b) the purchaser or lessee agrees to fulfill the terms and conditions relating to the project after such sale or lease and (c) either (i) the sale or lease is set forth in the original application and is part of the applicant's proposal for funds; or (ii) the agencies waive this provision for any sale or lease occurring after the 10th year from the date of issuance of the grant, loan or loan/grant.

The Sale Provision is unclear regarding when and if a sale or lease of award-funded broadband facilities is allowed in the case of a sale occurring prior to the 10th anniversary of a grant, loan or loan/grant. It suggests that the agencies are not required to approve a sale during such 10 year period even if the sale is for adequate consideration and the purchaser or lessee agrees to fulfill the terms and conditions relating to the project after such sale or lease (the second sentence reads: "The agencies may approve a sale...").

The Act provides generally that applicants for grants under the NTIA's Broadband Technology Opportunities Program ("BTOP") are required to provide matching funds of at least 20 percent of the broadband project's eligible costs (this requirement also is set forth in Section V(C)(4) of the NOFA). In order to meet their matching fund requirement, applicants may be required to solicit funds from private capital sources. Traditional financial investors generally require that they be able to liquidate their investments in a reasonable time period (typically 5-7 years) as a condition to making such investments.

If the agencies have the ability to arbitrarily veto a sale of award-funded broadband facilities prior to the 10 year anniversary of the grant or loan, even if such sale is for adequate consideration and the purchaser or lessee agrees to fulfill the terms and conditions relating to the project after such sale or lease, this will have a chilling effect on applicants' ability to raise their 20% matching funds requirement via traditional capital sources. Put differently, financial investors will not invest in broadband grant winners if there is a risk that their investment will be "locked up" by the federal government for at least ten years. If investors are dissuaded from investing in broadband infrastructure projects, it would undermine the federal government's goal of building broadband networks for communities that are unserved or under served for broadband access, since equity capital largely would not be available for smaller broadband operators who likely will be the main recipients of grants for these communities.

The agencies and the federal government have an interest in ensuring that grant monies for infrastructure projects are used to create jobs, provide broadband access to as many users as possible, and not result in unjust enrichment. Applicants' access to private capital to meet their 20% matching funds requirement is, we believe,

integral to the broadband program's success. We believe that the Sales Provision should be amended and clarified in a manner that ensures that the federal government's goals and objectives are met and its interests protected, while at the same time providing private capital certainty regarding their ability to liquidate their investments free from overly burdensome governmental oversight. **Specifically, we believe that the Sales Provision should be modified to make it clear that a sale or lease of award-funded broadband facilities is allowed in the case of a sale occurring prior to the 10th anniversary of a grant, loan or loan/grant, provided that (a) it is for adequate consideration; (b) the purchaser or lessee agrees to fulfill the terms and conditions relating to the project after such sale or lease and (c) the sale or lease does not result in unjust enrichment.** We believe that the Sale Provision should be modified to read as follows (new language underlined):

Sale or Lease of Project Assets. The sale or lease of any portion of the award-funded broadband facilities during their life is prohibited, except as provided herein. The agencies will approve a sale or lease if it is (a) for adequate consideration; (b) the purchaser or lessee agrees to fulfill the terms and conditions relating to the project after such sale or lease and (c) the sale or lease does not result in unjust enrichment. The sale or lease may be set forth in the original application and may be made a part of the applicant's proposal for funds. The agencies waive this approval right for any sale or lease occurring after the 10th year from the date of issuance of the grant, loan or loan/grant.

We are actively raising capital for award winners seeking financing for broadband initiatives under the Act, and the current language of the Sales Provision will make it impossible for us to attract private capital for the broadband program. We strongly urge the agencies to consider our changes to the Sales Provision (or issue a clarification that accomplishes the same goal), which would allow private capital to flow more freely into the broadband program and assist the federal government with ensuring the success of an important social program.

Respectfully,

Ray Hernandez

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