

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

In re Application of)	
)	
OP Corporation)	File No. 0001312627
)	
For Authority to Operate in the)	
1670-1675 MHz Band)	

ORDER

Adopted: September 30, 2003

Released: September 30, 2003

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION.

1. In this Order, we address a Request for Waiver filed by OP Corporation (OP), seeking a waiver of the Commission's rules with respect to the tribal lands bidding credit.¹ Specifically, OP requests that the Commission waive the rule requiring applicants that seek a tribal lands bidding credit to file certain certifications prior to license grant. For the reasons set forth below, we grant OP a limited waiver of section 1.2110(f)(3)(ii) of the Commission's rules.

II. BACKGROUND.

2. Recognizing that communities on tribal lands have had less access to telecommunications services than any other segment of the U.S. population, the Commission established auction bidding credits for use by winning bidders who pledge to deploy facilities and provide service to federally recognized tribal areas that have a telephone service penetration rate at or below 70 percent.² In order to obtain a bidding credit in a particular market, a winning bidder must indicate on its long-form application (FCC Form 601) that it intends to serve tribal lands in that market.³ Following the long-form application filing deadline, the applicant has 180 calendar days to amend its application to identify the tribal lands to be served, and provide certification from the tribal government(s) that: (1) it will allow the bidder to site facilities and provide service on its tribal land(s), in accordance with our rules; (2) it has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers, and will not unreasonably discriminate against any carrier; and (3) its tribal land is a qualifying tribal land as defined in our rules, *i.e.*, an area that has a telephone penetration rate at or below 70 percent.⁴ In addition, the

¹ See OP Corporation Request for Waiver, File No. 0001312627, filed June 23, 2003; OP Corporation Supplement to Request for Waiver, File No. 0001312627, filed August 25, 2003.

² In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 11794 (2000) (*Report and Order*).

³ 47 C.F.R. § 1.2110(f)(3)(ii).

⁴ *Id.*

applicant must amend its long-form application to file a certification that it will comply with the bidding credit build-out requirement, and that it will consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land. Upon receipt by the Commission of the certifications, the bidding credit is awarded and the applicant makes payment of the final net adjusted bid amount.⁵ If the required certifications are not provided at the conclusion of the 180-day period, the bidding credit is not awarded and the applicant is required to pay the balance on the original gross bid amount in order to be awarded the licenses.

3. On April 30, 2003, the Commission concluded the auction of one nationwide license in the 1670-1675 MHz band with OP as the winning bidder of that license.⁶ Consistent with the Commission's rules, OP timely filed a long-form application (FCC Form 601), indicating its intention to seek a tribal lands bidding credit.⁷ Subsequently, OP filed the instant request, seeking waiver of section 1.2110(f)(3)(ii) requirement that applicants seeking tribal lands bidding credits submit certifications from applicable tribal authorities prior to license grant.

III. DISCUSSION.

4. Section 1.925 of the Commission's rules permits us to grant a waiver request if it is shown that: 1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or 2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁸

5. The tribal certification requirement at issue reflects both the Commission's belief that tribal governments are uniquely situated to monitor the deployment of service and to ensure that carriers comply with the requirements of the program, as well as the fact that tribes retain sovereign powers over their territory.⁹ The bidding credit is contingent upon the carrier receiving approval to deploy service on tribal lands; the bidding credit, and, as a consequence, the net winning bid, cannot be calculated unless it is known which tribal areas are involved. This makes it necessary for winning bidders to obtain certifications from tribal authorities prior to license grant.

6. In its request for waiver, OP argues that unique factual circumstances of its license application and the public interest benefits that would result from its request are sufficient to warrant a waiver of the tribal land certification requirements.¹⁰ Specifically, OP notes that it submitted an upfront payment in the amount of \$12,628,000 prior to the commencement of the 1670-1675 MHz band auction --- the same amount that was later determined to be the winning bid for the license in the absence of the tribal lands bidding credit.¹¹ OP argues, *inter alia*, that the upfront payment it submitted satisfies its payment obligation to the Commission, and that this advance payment constitutes the type of unique circumstance that satisfies the Commission's waiver criteria.

⁵ *Id.*

⁶ See "1670-1675 MHz Band Auction Closes, Winning Bidder Announced," *Public Notice*, 18 FCC Rcd 9089 (WTB 2003) (*1670-1675 MHz PN*).

⁷ OP Corporation FCC Form 601, File No. 0003132627, filed May 14, 2003.

⁸ See 47 C.F.R. § 1.925.

⁹ See *Report and Order*, 15 FCC Rcd. at 11800-11801, para. 17.

¹⁰ OP Waiver Request at 3.

¹¹ See *1670-1675 MHz PN*, 18 FCC Rcd at Attachment A.

7. We find that unique circumstances exist such that strict application of the tribal lands bidding credit procedures in this case would not serve the public interest. We believe that support for a waiver of the tribal land certification requirements is found in the unique nature of the license at issue. As noted, the Commission auctioned only one license in the 1670-1675 MHz band. OP therefore will be the only provider in the 1670-1675 MHz service.¹² Delaying license grant until after OP provides the applicable tribal certifications will, in effect, delay provision of service of the entire 1670-1675 MHz band.¹³

8. The nationwide scope of this license also complicates the task of obtaining tribal certifications and increases the likelihood that license grant may be delayed significantly. It is axiomatic that there are a greater number of tribal areas eligible for the bidding credit in a nationwide market as compared to all other types of geographic area markets. It is reasonable to conclude that any difficulties or delays encountered in obtaining tribal certifications will increase in relation to the number of tribal areas that a carrier seeks to serve. Although OP may seek an extension of the certification deadline in order to obtain more time to file the applicable certifications,¹⁴ OP may not construct,¹⁵ provide service, or lease to other facilities-based providers until after license grant. Because our rules with respect to the 1670-1675 MHz band do not permit OP to begin operation pending authorization, the longer the time period OP takes to obtain the applicable certifications, the longer the period OP must defer deployment of service to the non-tribal areas of its nationwide market. We agree with OP's argument that, given the complications and delays likely involved in obtaining certifications for a nationwide license, the tribal certification requirement inordinately delays it from beginning the construction of its network, the early deployment of which, as OP notes, is all the more important due to the construction obligations imposed by the nationwide license.¹⁶

9. We believe that strict application of the tribal certification requirement in this situation would, in effect, require OP to choose between forgoing the bidding credit, or delaying the construction and deployment of facilities by OP or a lessee. Neither result is in the public interest as each runs counter to our goals of providing incentives for carriers to serve tribal lands and promoting the rapid deployment of new services. Instead, we believe that the public interest will best be served in this specific situation if we waive the rule requiring OP to submit certifications prior to grant of its application. Further, our decision to grant this waiver is reinforced by the fact that OP's prior upfront payment satisfies the full amount of

¹² Absent the partitioning or disaggregation of portions of OP's license.

¹³ This in contrast to other services in which application of the tribal certification requirement will not adversely affect the rapid deployment of those services or bands as a whole because of the presence of multiple licensees.

¹⁴ In the past, the Wireless Telecommunications Bureau has been amenable to providing extensions of the certification deadline where an applicant has shown that such an extension is necessary. *See* Letter from Linda C. Ray, Commercial Wireless Division, Wireless Telecommunications Bureau, and Scot Stone, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, to Warren C. Havens, Telesaurus Holdings GB, LLC, dated September 28, 2001; Letter from Linda C. Ray, Commercial Wireless Division, Wireless Telecommunications Bureau, to Cheryl A. Tritt, Esq., Counsel for Space Data, dated January 30, 2002; Letter from Linda C. Ray, Commercial Wireless Division, Wireless Telecommunications Bureau, to Scott MacIntyre, dated February 21, 2002; Letter from Linda C. Ray, Commercial Wireless Division, Wireless Telecommunications Bureau, to Scott MacIntyre, dated June 20, 2002.

¹⁵ We note that our rules provide that an applicant may not begin to pre-grant construction of its facilities if it has requested a waiver of one or more of the Commission's rules. *See* 1.2113(d)(1).

¹⁶ *See* Supplement to Waiver at 4-5.

the winning bid although OP's prior upfront payment is not, by itself, the type of unique circumstance that satisfies the Commission's waiver criteria as OP claims.¹⁷

10. Finally, although we find that circumstances in this matter warrant a waiver of the tribal certification requirements, we also find that we must limit the scope of the waiver in light of other requirements associated with the tribal lands bidding credit. Specifically, our rules provide that a licensee obtaining a tribal lands bidding credit must construct and operate its system to cover 75 percent of the population of the tribal land within three years of license grant.¹⁸ The Commission imposed this heightened construction requirement in order to ensure that telecommunications services will be rapidly deployed to unserved tribal areas, and that only entities making a serious commitment to serving tribal lands will receive bidding credits.¹⁹ Because we remain committed to our goal of rapid deployment of service to tribal lands, and because we conclude that it would be inconsistent with the shortened tribal lands construction period if OP were allowed to have an indefinite period of time to submit the applicable tribal certifications, we find that it is necessary to limit the time within which OP must provide certifications from tribal governments. Accordingly, we direct OP to file its tribal certifications within one year of license grant. We believe that the one-year time period provides OP with necessary flexibility, yet also ensures that OP complies with its obligations regarding the tribal lands bidding credit. Further, because we are permitting OP to submit its certifications after grant of the license, OP's tribal lands construction requirement shall run from the date that its tribal certifications are filed in order to provide OP with the full three-year construction period. Accordingly, OP is required to file a notification of construction (FCC Form 601, schedule K) within three years of the filing of the tribal certifications.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, the Request for Waiver filed by OP Corporation, File No. 0001312627, IS GRANTED to the extent provided herein.

12. IT IS FURTHER ORDERED that the Public Safety and Private Wireless Division SHALL PROCESS File No. 0001312627 consistent with this Order and the Commission's Rules. This action is taken under delegated authority pursuant to sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John B. Muleta
Chief
Wireless Telecommunications Bureau

¹⁷ We note that OP's other arguments do not play a part in our decision to grant the waiver request. *See* Waiver Request at 4-6.

¹⁸ 47 C.F.R. § 1.2110(f)(3)(ii).

¹⁹ *See Report and Order*, 15 FCC Rcd at 11806-11807, para. 35.