

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

In the matter of)
Westelcom Network, Inc.)
Request for Waiver of Section 1.2110(f)(3)(i) of)
the Commission's Rules)
FCC File No. 0001358682

ORDER ON RECONSIDERATION

Adopted: January 31, 2007

Released: January 31, 2007

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. On December 29, 2004, Westelcom Network, Inc. ("Westelcom") filed a petition for reconsideration of the November 30, 2004 action by the Wireless Telecommunications Bureau, Mobility Division, denying Westelcom's request for waiver of section 1.2110(f)(3)(i) of the Commission's rules. For the reasons stated below, we deny Westelcom's Petition.

2. Background. Westelcom was the winning bidder for two licenses in the Lower 700 MHz Band Auction (Auction No. 49), and is seeking tribal land bidding credits to serve the St. Regis Mohawk Tribe of upstate New York ("St. Regis"). On January 9, 2004, Westelcom submitted a petition requesting waiver of section 1.2110(f)(3)(i) of the Commission's rules to provide high speed broadband wireless data service within the boundaries of the St. Regis reservation. Pursuant to section 1.2110(f)(3)(i) of the Commission's rules, to qualify for tribal land bidding credits, an applicant must serve a "[q]ualifying tribal land" with "a wireline telephone subscription rate equal to or less than eighty-five (85) percent." St. Regis has a wireline penetration rate of 100 percent.

1 Petition for Reconsideration by Westelcom Network, Inc. (filed Dec. 29, 2004) ("Petition").

2 Letter from Erin A. McGrath, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau, to David L. Nace, Counsel for Westelcom Network, Inc. (Nov. 30, 2004) ("Division Letter").

3 Petition for Waiver and Extension of Time, filed Jan. 9, 2004 (FCC File No. 0001358682) ("Waiver Petition").

4 47 C.F.R. § 1.2110(f)(3)(i).

5 See Westelcom Application, File No. 0001358682 (June 27, 2003). This application has been amended multiple times since it was originally filed.

6 See Waiver Petition at 1.

7 47 C.F.R. § 1.2110(f)(3)(i). When Westelcom filed its Waiver Petition, a "[q]ualifying tribal land" was a tribal land with "a wireline telephone subscription rate equal to or less than seventy (70) percent." However, the Commission adjusted the eligibility criteria based on the 2000 Census. See Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, Third Report and Order, 19 FCC Rcd 17652, 17653, 17658-59 ¶¶ 2, 14-18 (2004) ("Tribal Lands Third R&O")

8 See St. Regis Mohawk Tribal Council Resolution #2003 ("Tribal Council Resolution"). The tribe certifies that it has a "wireless penetration rate of 100% and a wireline penetration rate of less than 70%." See id. (emphasis in

(continued....)

3. On November 30, 2004, the Division denied Westelcom's request to waive the requirements of section 1.2110(f)(3)(i). The Division found that Westelcom had failed to meet the waiver standard under section 1.925 of the Commission's rules, in that it had not shown (1) how the underlying purpose of the rule would not be served or would be frustrated in this case, or (2) unique or unusual circumstances, such that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, leaving it with no reasonable alternative. The Division noted that the underlying purposes of section 1.2110(f)(3)(i) specifically, and the tribal lands bidding credit program in general, is to provide incentives to carriers to provide services to tribal areas lacking basic telecommunications coverage.⁹ Furthermore, the Commission initiated the tribal lands bidding credit program specifically for tribal lands with low wireline penetration rates, which fail to receive communications services commonplace in many places of the country.¹⁰ While the Division acknowledged the efforts of Westelcom to bring the benefits of advanced telecommunications service to tribal lands, it stated that it did not believe that the Commission contemplated awarding tribal lands bidding credits to an applicant proposing to serve a tribal land with ubiquitous wireline service,¹¹ since the rule specifically restricts qualifying tribal lands to those with a wireline subscription rate equal to or less than 85 percent.¹² On December 29, 2004, Westelcom filed the Petition seeking reconsideration of the Division's decision.

4. *Discussion.* Other than repeating the arguments it unsuccessfully made in its Waiver Petition, Westelcom suggests that the Division limited itself when it focused its analysis more on the "underlying purpose of the rule" than on the "unique or unusual circumstances" that would make application of the rule inequitable, unduly burdensome, or contrary to the public interest.¹³ Westelcom further argues that there is "good cause" that the rule should be waived here.¹⁴ Westelcom suggests that its commitment to bringing high speed wireless data service to St. Regis is the type of unique, unusual circumstance that justifies a waiver.¹⁵ Further, because the Commission has stated the need to ensure that rural communities enjoy the benefits of broadband and other advanced telecommunications service, Westelcom asserts that this is just the kind of "good cause" that warrants waiver of the rule.¹⁶

5. In denying Westelcom's Petition, we return to one of the underlying reasons the Commission established the tribal lands bidding program - to reward licensees who assume the risks associated with bringing basic telecommunications service to those tribal lands that lacked it. We find no evidence that the Commission intended to reward an applicant for deploying advanced wireless telecommunications services to one of the nation's most "wired" tribal areas. Nothing Westelcom has presented here persuades us that the Commission created the tribal land bidding credit program to provide

(...continued from previous page)

original). This discrepancy is resolved in the Waiver Petition, where Westelcom clarifies that St. Regis has a 100% wireline penetration rate. See Waiver Petition at 2.

⁹ See Division Letter at 2-3; see also Tribal Lands Third R&O, 19 FCC Rcd at 17658-59 ¶¶ 14, 16.

¹⁰ See In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 11794, 11798-99 ¶¶ 8-10, 14 (2000). The Commission noted that the tribal lands bidding program was meant "to promote the deployment of wireless telecommunications services to tribal lands with little or no access to telecommunications service." *Id.* at 11799 ¶ 14.

¹¹ See Division Letter at 1-3.

¹² See 47 C.F.R. § 1.2110(f)(3)(i); see also discussion *supra* note 7.

¹³ See Petition at 4, citing 47 C.F.R. § 1.925.

¹⁴ See Petition at 4, citing 47 C.F.R. § 1.3.

¹⁵ See Petition at 4.

¹⁶ See Petition at 4-5.

financial assistance to a wireless carrier that wishes to provide service to a tribe with a 100 percent wireline penetration rate. Thus, there is neither good cause to grant the requested waiver nor are there “unusual or unique factual circumstances” that would warrant the relief sought by Westelcom.

6. Accordingly, IT IS ORDERED that Pursuant to sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, the petition for reconsideration filed by Westelcom Network, Inc. on December 29, 2004, IS DENIED.

7. 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

Katherine M. Harris
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau