

II. BACKGROUND

2. In June 2000, the Commission adopted rules and policies that provide incentives for wireless providers to serve individuals on tribal lands.⁶ The Commission awards bidding credits to auction winning bidders which use licenses to deploy facilities and provide service to federally-recognized tribal lands that are unserved by a telecommunications carrier or that have a telephone service penetration rate below 85 percent.⁷ To obtain these bidding credits, a winning bidder must, among other requirements, amend its long-form auction application within 180 days⁸ after the application filing deadline to include the required certifications from the tribal government(s) and the applicant.⁹ The Commission has recognized the appropriateness of requiring a tribal government certification, because of “the unique sovereign status of Indian tribes, the trust relationship between the federal government and Indian tribes, and our ongoing federal obligation to guarantee the right of Indian tribes to self-government.”¹⁰ Further, the Commission has stated that “applicants for tribal lands bidding credits are unlikely to be able to provide service to tribal lands without first obtaining the consent of the tribal governments to operate on tribal lands.”¹¹

3. In Auction 39, held in June 2001, Telesaurus was the high bidder for 77 LMS and three VPC licenses.¹² Out of these 80 licenses, Telesaurus sought tribal land bidding credits for 34 LMS and

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consult with the tribal government regarding siting of facilities and deployment of service on tribal land. See 47 C.F.R. §§ 1.2110(f)(3)(ii)(B), 1.2110(f)(3)(vi). Together, the applicant certification and the tribal government certification are known as the “required certifications.”

⁶ 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, 11794 ¶ 1 (2000) (*Tribal Lands Report and Order*).

⁷ *Id.* at 11794, 11800, 11802 ¶¶ 1, 16, 22. In the *Tribal Lands Report and Order*, the telephone penetration rate was originally set at 70 percent, but, in 2004, this rule was changed to increase the telephone penetration rate to 85 percent. See *id.* at 11794, 11802 ¶¶ 1, 22; Extending Wireless Telecommunications Services to Tribal Lands, WT Docket 99-266, *Third Report and Order*, 19 FCC Rcd 17652, 17652, 17659 ¶¶ 1, 18 (2004) (*Tribal Lands Third Report and Order*).

⁸ 47 C.F.R. § 1.2110(f)(3)(ii). Under the rules in effect when Telesaurus initially filed its FCC Form 601 for LMS licenses, on June 29, 2001, an applicant seeking a tribal land bidding credit had 90 days after such filing to amend its application. The Commission amended this rule in March 2003 to allow an applicant 180 days after initially filing to amend its application. See Extending Wireless Telecommunications Services to Tribal Lands, WT Docket 99-266, *Second Report and Order and Second Notice of Proposed Rulemaking*, 18 FCC Rcd 4775, 4779 ¶ 10 (2003).

⁹ 47 C.F.R. § 1.2110(f)(3)(ii). The tribal government certification must state that “(1) [t]he tribal government authorizes the winning bidder to site facilities and provide service on the tribal land; (2) [t]he tribal area to be served by the winning bidder constitutes qualifying tribal land; and (3) [t]he tribal government has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers, and will not unreasonably discriminate among wireless carriers seeking to provide service on a qualifying tribal land.” *Id.*

§ 1.2110(f)(3)(ii)(A). The applicant must certify that it will comply with the tribal land bidding credit construction requirements in section 1.2110(f)(3)(vii) of the Commission’s rules, *id.* § 1.2110(f)(3)(vii), and consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land. *Id.*

§ 1.2110(f)(3)(ii)(B).

¹⁰ *Tribal Lands Third Report and Order*, 19 FCC Rcd at 17656-57 ¶ 9 (discussing why the Commission refused to eliminate the tribal government certification).

¹¹ *Id.* at 17657 ¶ 9.

¹² See VHF Public Coast and Location and Monitoring Service Spectrum Auction Closes; Winning Bidders Announced, *Public Notice*, DA 01-1443 (rel. June 15, 2001). See also File Nos. 0000506721 (filed June 29, 2001); 000506843 (filed June 29, 2001; amended Sept. 21, 2001; Mar. 25, 2002; May 16, 2003; and Feb. 8, 2007); (continued....)

two VPC licenses.¹³ Over the course of almost five and a half years, Telesaurus sought, and was granted, extensions of time to secure the required certifications based on Telesaurus's effort to reach out to and work with tribal governments.¹⁴

4. On January 25, 2007, after several years of Telesaurus not being able to secure and submit the required certifications, the Mobility Division (Division), Wireless Telecommunications Bureau (Bureau), denied Telesaurus's request for another waiver that would have further extended their deadline for obtaining the required certifications.¹⁵ The Division explained that the unsupported assertions by Telesaurus regarding the difficulty of securing certifications from tribal governments and obtaining LMS equipment failed to meet the waiver standard under section 1.925 of the Commission's rules.¹⁶ The Division further stated that, "almost six years after Auction 39 ended, with not a single certification submitted, it simply is not plausible to suggest that an applicant needs additional time to persuade tribal governments and secure tribal certifications."¹⁷ On January 26, 2007, the Bureau announced it was prepared to grant Telesaurus's license, upon full and timely payment.¹⁸

5. On January 29, 2007, Telesaurus filed a petition for reconsideration of the Division's denial of Telesaurus's extension request and a request to stay application of the Public Notice.¹⁹ On February 8, 2007, the Division partially granted Telesaurus's petition, giving Telesaurus over one more year, until June 30, 2008, to submit the required certifications.²⁰ While finding that Telesaurus's argument regarding the availability of LMS equipment (or the lack thereof) did not support an extension of the period of time for Telesaurus to supply the required certifications, the Division was persuaded that Telesaurus had made substantial progress in working with Native American entities and governments to bring the benefits of wireless services to tribal areas.²¹ Consequently, based on Telesaurus's showing of outreach to tribal governments, the Division found that extending, until June 30, 2008, the time for Telesaurus to secure and submit the required certifications was consistent with the Commission's goals

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0000506882 (filed June 29, 2001; amended Sept. 21, 2001; Mar. 25, 2002; and Feb. 8, 2007); 0000537185 (filed June 29, 2001).

¹³ See File Nos. 0000506843, 0000506882. Telesaurus did not seek tribal land bidding credits for 43 LMS licenses and one VPC license. See File Nos. 0000506721, 0000537185.

¹⁴ See, e.g., Letter from Linda C. Ray, Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, and Scot Stone, Deputy Chief, Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Warren C. Havens, President, Telesaurus Holdings GB, LLC (Sept. 28, 2001) (granting extension of time based on inability to meet with tribal governments because of the September 11, 2001, terrorist attacks), available at File Nos. 0000506843, 0000506882.

¹⁵ See Letter from Erin A. McGrath, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Warren C. Havens, President, Telesaurus Holdings GB, LLC (Jan. 25, 2007) (Jan. 25, 2007 Mobility Division Letter).

¹⁶ 47 C.F.R. § 1.925.

¹⁷ Jan. 25, 2007 Mobility Division Letter at 3.

¹⁸ See Wireless Telecommunications Bureau Announces It Is Prepared To Grant 36 VHF Public Coast and Location Monitoring Service Licenses Upon Full and Timely Payment, *Public Notice*, 22 FCC Red 839 (MD, WTB 2007) (Public Notice).

¹⁹ See Petition for Reconsideration and Section 1.41 Request (filed Jan. 29, 2007; amended Feb. 1, 2007).

²⁰ Feb. 8, 2007 Mobility Division Letter at 3.

²¹ *Id.*

of providing incentives for carriers to serve tribal lands, and promoting the rapid deployment of new services in tribal areas.²²

6. At the same time, the Division denied Telesaurus's request for stay of its payment obligation until after it had secured required certifications. Instead, the Division required that Telesaurus comply with the deadlines set out in the Public Notice, adding that "[i]n the event Telesaurus is able to secure and submit the required tribal and applicant certifications by June 30, 2008, the Commission will refund to Telesaurus the amount of the tribal lands bidding credit."²³ Telesaurus met its payment obligation, and its LMS application was granted on March 9, 2007.²⁴ Concurrently with the release of the public notice granting these LMS licenses,²⁵ Telesaurus received the 34 LMS and two VPC licenses.²⁶

7. On July 1, 2008, Telesaurus filed the instant Waiver Request.²⁷ Telesaurus argues that it has met the requirements of section 1.2110 of the Commission's rules related to obtaining a tribal land bidding credit and requests that it be granted a "permanent refund and tribal land bidding credit."²⁸ Telesaurus bases its request on its assignment of two megahertz of LMS spectrum to its wholly-owned and affiliated non-profit foundation, Skybridge Spectrum Foundation ("Skybridge").²⁹ In the alternative, Telesaurus seeks additional time, until June 30, 2009, to secure and submit the required certifications.³⁰

III. DISCUSSION

8. Section 1.925 of the Commission's Rules provides that we may grant a waiver if it is shown that (a) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest; or (b) in light of unique or unusual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.³¹ We conclude that grant of the instant waiver requested is not warranted under the Commission's waiver rule. Telesaurus has not shown how the underlying purpose of the subject rule (*i.e.*, section 1.2110(f)(3) of the

²² *Id.*

²³ *Id.* In order for its Auction 39 applications (LMS and VPC) to be granted, Telesaurus was required to make full and complete payment of the balance of its winning bids. *See id.* (citing Public Notice). The Division stated that "it was neither the intention of the Commission nor the purpose of the tribal lands bidding credit program to delay the grant of licenses won at auction by almost six years." *Id.*

²⁴ Wireless Telecommunications Bureau Grants 36 VHF Public Coast and Location and Monitoring Service Licenses, *Public Notice*, 22 FCC Rcd 4628 (2007) (March 9, 2007 Public Notice).

²⁵ The grant of the VPC application also appeared on the March 9, 2007 Public Notice.

²⁶ These licenses were assigned consecutive call signs from WQGN573 through WQGN606 (LMS) and WQGN915 and WQGN916 (VPC).

²⁷ We reiterate that this Waiver Request only seeks an extension of time involving Telesaurus's 34 LMS licenses for which it sought tribal land bidding credits, and not the two VPC licenses for which it also sought such credits. *See supra* note 1.

²⁸ Waiver Request at 1. We assume this to mean compliance with section 1.2110(f)(3) *et seq.* of the Commission's rules. 47 C.F.R. § 1.2110(f)(3) *et seq.*, "Bidding credit for serving qualifying tribal land."

²⁹ Waiver Request at 1, 2-3. *See also* Application, File No. 0003134330 (filed Aug. 8, 2007; consented Oct. 4, 2007; consummated Nov. 4, 2007).

³⁰ Waiver Request at 3-8. We note that June 30, 2009 has past. The Commission has not received any further extension requests from Telesaurus.

³¹ 47 C.F.R. § 1.925(b)(3). *See also* *WAIT Radio v FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969).

Commission's rules) would not be served by application in this case, nor how such application would be contrary to the public interest.

9. Telesaurus first asks that the Commission consider that the requirements of section 1.2110(f)(3) of the Commission's rules be considered fulfilled, based on Telesaurus's assignment of two megahertz of the six megahertz of spectrum covered by the LMS A-block licenses, "including in virtually all of the areas in which there are federally recognized tribal lands. . . ." ³² Telesaurus adds that Skybridge is "firmly committed to using the . . . spectrum in tribal areas at no cost to the tribal land authorities or at cost. . . ." ³³

10. Telesaurus's and Skybridge's proposed actions in relation to the two megahertz of LMS spectrum are not sufficient to fulfill the requirements of 1.2110(f)(3) of the Commission's rules. As the Commission has noted, an important component of the tribal land bidding credit program is recognizing and fostering tribal sovereignty. ³⁴ An integral part of that recognition is the active participation of tribal governments in processes that affect them; indeed, the requirement that the tribal government file a certification is an acknowledgement of that sovereignty. ³⁵ The Waiver Request does not include any indication that either Telesaurus or Skybridge has been in contact with any tribal entities. We therefore cannot consider granting a tribal land bidding credit in the complete absence of any input from tribal authorities. Merely transferring spectrum to a wholly-owned nonprofit foundation does not merit these types of bidding credits. Further, the purpose of the tribal land bidding credit program is the rapid deployment of wireless services to underserved tribal areas. The requirements of the program and compliance with the rules of the tribal land bidding credit program are not fulfilled by a generalized pledge to serve Indian Country. We therefore deny Telesaurus's waiver request that it be granted a permanent refund and tribal land bidding credit based on its assignment of two megahertz of spectrum to Skybridge.

11. In the alternative, Telesaurus asks that it be granted one additional year, *i.e.*, until June 30, 2009, to submit and secure the required certifications from tribal authorities. ³⁶ Telesaurus believes an extension is justified due to its extensive, on-going effort to acquire TETRA technology and equipment. ³⁷ First, we note that this date has passed and Telesaurus did not amend its application to seek an extension beyond June 30, 2009. Furthermore, we note that, in the February 8, 2007 Mobility Division Letter granting Telesaurus an extension until June 30, 2008, the Division specifically rejected Telesaurus's

³² Waiver Request at 2.

³³ *Id.*

³⁴ See *Tribal Lands Report and Order*, 15 FCC Rcd at 11800-01 ¶ 17, which states:

[a]lthough the Communications Act vests the Commission with exclusive jurisdiction over the management of spectrum (except spectrum allocated to the Federal government) and the licensing of wireless carriers, Indian tribes retain important sovereign powers over their territory under the plenary power vested in Congress by the U.S. Constitution. We have structured our [tribal land bidding credit program] rules to enable the tribes to be active participants in the bidding credit program because they are in the best position to negotiate terms and conditions with the carriers and to ensure that carriers will meet their commitments to deliver service to the tribal areas with the greatest need. (Footnote omitted).

³⁵ See 47 C.F.R. § 1.2110(f)(3)(ii)(A) (listing the terms under which a tribal government allows an applicant to site facilities and serve the tribal population).

³⁶ Waiver Request at 3-8.

³⁷ *Id.* at 4.

extension request based on the apparent non-availability of equipment.³⁸ Rather, the Mobility Division based its decision to waive its rules and grant Telesaurus an extension of time on what it understood to be Telesaurus's progress in working with tribes, and its long-standing engagement with tribal leaders. The Division specifically allowed an additional year to provide Telesaurus with sufficient time to secure the required certifications.³⁹ Unfortunately, in its Waiver Request, Telesaurus does not mention any progress it has made in meeting with tribal leaders. Rather, Telesaurus simply repeats an argument that we have rejected twice previously – that it should be granted an extension because of the lack of equipment.⁴⁰ Telesaurus has failed to establish how applying the rule here would be contrary to the public interest. We, therefore, deny Telesaurus's request in its entirety.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.925 and 1.2110 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.2110, that the Request for Waiver of section 1.2110 of the Commission's Rules that the requirements of the tribal land bidding credits rules be considered fulfilled, or, in the alternative, Request for Waiver of section 1.2110(f)(3)(ii) of the Commission's Rules, 47 C.F.R. Section 1.2110(f)(3)(ii), filed by Telesaurus Holdings GB, LLC, on June 30, 2008 and July 1, 2008, File Nos. 0000506843, 0003492004, IS DENIED.

13. 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

Monica S. Desai
Deputy Bureau Chief
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³⁸ See Feb. 8, 2007 Mobility Division Letter at 3, "Telesaurus's arguments regarding the availability (or lack thereof) do not support the relief it requests, *i.e.*, the extension of the period of time for Telesaurus to supply the required tribal land bidding credit certifications." The Feb. 8, 2007 Mobility Division Letter was itself an affirmation of the Jan. 25, 2007 Mobility Division Letter in which the Division explained that simply averring to the difficulty of securing tribal government and obtaining LMS equipment was insufficient to waive the rules and grant an extension. In other words, lack of equipment for a given service does not warrant waiver of the rules; rather, it may indicate that the tribal land bidding credit program is not appropriate for that service. See Jan. 25, 2007 Mobility Division Letter.

³⁹ Feb. 8, 2007 Mobility Division Letter at 3 ("We are, however, persuaded that Telesaurus has made substantial progress in working with Native American entities and governments to bring the benefits of wireless services to tribal areas.").

⁴⁰ See generally Feb. 8, 2007 Mobility Division Letter; Jan. 25, 2007 Mobility Division Letter.