

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

In the Matter of)
)
Cross Wireless, LLC)
)
Waiver of Section 54.1003(a) of the)
Commission’s Rules)

ORDER

Adopted: September 11, 2013

Released: September 11, 2013

By the Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On our own motion, we grant Cross Wireless, LLC (Cross) a waiver of the Mobility Fund Phase I eligibility rule that requires an applicant to be formally designated as an eligible telecommunications carrier (ETC) by the close of the relevant auction short-form filing window in all of the areas for which it applies to bid for support. Cross had six winning bids in Auction 901, the first auction of Mobility Fund Phase I support. However, for eligible census blocks in three of the census tracts for which Cross won support, its designation as an ETC, although timely recommended by a state administrative law judge (ALJ), was not formally certified by the state commission until two weeks after the close of the short-form filing window. Because we find that a waiver of the ETC eligibility requirement in this case would not conflict with the policy underlying the rule and would serve the public interest, we waive the requirement for Cross to have received its formal ETC designation by the short-form filing window in the three census tracts at issue.

II. BACKGROUND

2. The bidding in Auction 901 occurred on September 27, 2012.¹ The auction produced 33 winning bidders eligible to receive a total of nearly \$300 million in one-time Mobility Fund Phase I universal service support to provide advanced mobile telecommunications services in areas without such services.² To participate in the auction, each applicant, with a narrow exception not relevant here, was required to have been, by the July 11, 2012, close of the short-form filing window, formally designated as an ETC in the geographic areas for which it was applying to bid for support.³ The Commission’s short

¹ “Mobility Fund Phase I Auction Closes; Winning Bidders Announced for Auction 901,” *Public Notice*, 27 FCC Rcd 12031, 12032 (WTB/WCB 2012) (“*Closing PN*”).

² *Id.*

³ “Mobility Fund Phase I Auction Scheduled for September 27, 2012; Notice and Filing Requirements and Other Procedures for Auction 901,” *Public Notice*, 27 FCC Rcd 4725, 4740 ¶¶ 32, 40 (WTB/WCB 2012) (“*Procedures PN*”); Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service (continued....)

form application did not, however, require an applicant to identify the specific areas for which it intended to bid. Cross timely filed an Auction 901 short-form application,⁴ bid in the auction, and became the winning bidder for support for certain census blocks in six Oklahoma census tracts.⁵

3. Every Auction 901 winning bidder was required to file an application for Mobility Fund Phase I Support (referred to as a long-form application) by November 5, 2012.⁶ Commission staff review of Cross's long-form application revealed that, while Cross had been designated an ETC by the time it bid in the auction, it did not receive its ETC designation for areas associated with three of the census tracts for which it won support until two weeks after the close of the filing window for Auction 901 short-form applications.⁷ An ALJ with the Oklahoma Corporation Commission (OCC) had conducted a hearing on the merits on Cross's application for ETC designation on July 5, 2012, six days before the short-form filing deadline,⁸ and during the hearing had recommended on the record that the OCC approve Cross's application; however, the ALJ did not issue his recommendation in writing to the OCC until July 17, 2012.⁹ On July 25, 2012, the OCC formally granted Cross its ETC designation in the three census tracts in issue. In so doing, the OCC approved the ALJ's July 5, 2012 recommendations without modification and adopted the ALJ's findings as the OCC order.¹⁰

III. DISCUSSION

4. The Commission may waive its rules on its own motion "if good cause therefor is shown."¹¹ A waiver of the rules is appropriate only if "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."¹² In certain cases, a rule waiver may serve the

(Continued from previous page) _____

Reform—Mobility Fund, *Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663, 17798-801 ¶¶ 388-89 (2011) (*USF/ICC Transformation Order*), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011). *See* 47 C.F.R. §§ 54.1003(a), 54.1005(a)(3); *but see* 47 C.F.R. § 54.1004(a) (permitting a Tribally-owned or -controlled entity that has pending an application to be designated an ETC to participate in a Mobility Fund Phase I auction but requiring such an auction winner to be designated an ETC before receiving Phase I support). An ETC is a carrier designated to receive support under subpart C of the Commission's Universal Service rules. 47 C.F.R. §§ 54.5, 54.201-54.203; *see* 47 U.S.C. § 214(e).

⁴ *See* "Mobility Fund Phase I Auction; 52 Bidders Qualified to Participate in Auction 901," *Public Notice*, 27 FCC Rcd 10919, 10929 (WTB/WCB 2012).

⁵ *Closing PN*, 27 FCC Rcd at 12045.

⁶ *Procedures PN*, 27 FCC Rcd at 4768 ¶ 158, 4769-4775 ¶¶ 160-182; 47 C.F.R. § 54.1005(b). The long-form filing deadline originally was scheduled for November 1, 2012, but was extended because of the disruption resulting from Hurricane Sandy. *Closing PN*, 27 FCC Rcd at 12034 ¶ 10; "Mobility Fund Phase I Auction Long-Form Application Deadline Extended," *Public Notice*, 27 FCC Rcd 13424 (WTB/WCB 2012).

⁷ Winning bid numbers T40107080600-5620, T40133583700-5830, and T40133583800-5830.

⁸ *See* Oklahoma Corporation Commission, Application of Cross Wireless, LLC, Final Order, Case No. PUD 201200076, Order No. 600169, at 1-2, 7 (July 25, 2012) ("OCC Order").

⁹ *See* OCC Order at 8.

¹⁰ *See id.* at 7-8.

¹¹ 47 C.F.R. § 1.3.

¹² *See, e.g., Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

public interest where the waiver would not conflict with the policy underlying the rule.¹³ As explained below, we conclude that a waiver is appropriate under the specific circumstances presented here.

5. We first evaluate whether a waiver would conflict with the policy underlying the requirement adopted in the *USF/ICC Transformation Order* that auction participants seeking Mobility Fund Phase I support be formally designated as ETCs by the close of the short-form filing window.¹⁴ In establishing this requirement, the Commission rejected the alternative “of allowing parties to bid for support prior to being designated an ETC, provided they ha[d] an application for designation pending.” It explained that that option “would inject uncertainties as to eligibility that could interfere with speedy deployment of networks by those that are awarded support, or disrupt the Mobility Fund auction.”¹⁵

6. In this case, however, Cross received its formal ETC designation for the three census tracts at issue more than two months before the start of bidding. Even before the short-form filing deadline the OCC’s ALJ had recommended on the record that Cross’s application be approved, a recommendation that followed testimony from the OCC staff witness that grant of Cross’s application would be in the public interest and would not harm any other ETC.¹⁶

7. Moreover, we conclude that in the context of the first auction of Mobility Fund Phase I support, Cross exercised adequate diligence in seeking to expand its ETC designation. For many applicants, like Cross, obtaining ETC designation requires approval by the relevant state authority. In adopting the ETC eligibility requirement for Mobility Fund Phase I, the Commission therefore advised potential applicants to begin the process of becoming formally designated as ETCs promptly in order to be eligible in time to participate in the auction.¹⁷ Cross filed its application with the OCC requesting the relevant ETC designations on May 9, 2012, one week after the release of the *Procedures PN*, which finalized the list of areas eligible for support in Auction 901 and the procedures governing the auction process.¹⁸ Under the circumstances, we find that that Cross demonstrated adequate diligence in applying for its ETC designation.¹⁹

8. Furthermore, given that the forms and procedures for Auction 901 were new to applicants, it appears that Cross exercised adequate diligence in the auction process. As stated above, Cross was under no obligation at the short-form filing deadline to indicate the specific geographic areas for which it intended to bid, and compliance with the eligibility requirement required only a general certification of

¹³ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (finding that the Commission may decide in some instances that a rule waiver serves the public interest if an applicant’s proposal will not undermine the policy served by the rule).

¹⁴ *USF/ICC Transformation Order*, 26 FCC Rcd at 17798-99 ¶¶ 388-392.

¹⁵ *Id.* at 17799 ¶ 392.

¹⁶ OCC Order at 5-7.

¹⁷ *USF/ICC Transformation Order*, 26 FCC Rcd at 17798 ¶ 390.

¹⁸ See OCC Order at 1; *Procedures PN*, 27 FCC Rcd at 4725.

¹⁹ See OCC Order at 8. It appears from the record that prior to filing its short form application Cross may not have been contemplating bidding on the census tracts at issue. During the July 5, 2012 hearing, the ALJ asked Cross’s witness, General Manager John C. Ruhl, whether Cross would be participating in “Phase I of the Mobility Fund that required an ETC order by July 11, 2012.” *Id.* at 5. Ruhl replied that Cross had already been designated as an ETC in the areas on which it would participate in the Phase I Mobility Fund auction and that grant of its pending application would provide it with the ETC eligibility it needed for Phase II. *Id.* at 5.

ETC designation. Additionally, while the Commission's software did not prevent Cross from bidding for areas in which its ETC designation had been formalized only after it had filed its short form application, Cross's winning bids covered only areas in which it had actually been designated an ETC.

9. For all these reasons, we conclude that Cross's failure to meet the deadline for some of its winning bids did not undermine the purpose of the deadline. We further find that in these circumstances grant of the waiver serves the public interest by giving effect to Cross's winning bids, which will provide support to enable the availability of 3G or better mobile voice and broadband service across all six of the areas covered by those winning bids.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 4(i), 4(j), 5(c), 201, 254, and 303(r) of the Communications Act, 47 U.S.C. §§ 151, 154(i), 154(j), 155(c), 201, 254, 303(r), and sections 0.131, 0.331, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, and 1.3, section 54.1003(a) of the Commission's rules, 47 C.F.R. § 54.1003(a), is waived for Cross Wireless, LLC, to the extent described herein.

11. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Margaret W. Wiener
Chief, Auctions and Spectrum Access Division
Wireless Telecommunications Bureau