

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

In the matter of)
)
GCI Communication Corp.)
)
Waiver of Section 54.1007(a) of the)
Commission’s Rules)

ORDER

Adopted: November 21, 2013

Released: November 21, 2013

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

I. INTRODUCTION

1. In this order, we grant, in part, a request from GCI Communication Corp. (“GCI”) for relief from the requirement to submit a separate acceptable irrevocable stand-by letter of credit (“LOC”) for each of its winning bids for Mobility Fund Phase I support as a guarantee of its performance in meeting its public interest obligations associated with those winning bids for certain areas in Alaska. Specifically, we allow GCI to submit no fewer than 13 irrevocable stand-by LOCs with its long-form application for Mobility Fund Phase I support covering 218 winning bid areas, with each LOC corresponding to a group of census blocks associated with a project-specific network upgrade to provide broadband service to particular communities in Alaska. Because we find that a waiver of the one LOC per winning bid requirement in this case would not conflict with the policy underlying the rule and would serve the public interest, we grant GCI’s request to the extent described in this order.

II. BACKGROUND

2. *Mobility Fund Phase I.* GCI’s request for relief arises out of its status as a winning bidder in the Commission’s first auction of Mobility Fund Phase I support, which was designated Auction 901.

3. In the *USF/ICC Transformation Order*, the Commission comprehensively reformed and modernized the universal service system to help ensure the universal availability of fixed and mobile communication networks capable of providing voice and broadband services where people live, work, and travel.¹ The Commission’s universal service reforms include a commitment to fiscal responsibility, accountability, and the use of market-based mechanisms, such as competitive bidding, to provide more

¹ Connect America Fund, WC Docket No. 10-90, A National Broadband Plan for Our Future, GN Docket No. 09-51, Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135, High-Cost Universal Service Support, WC Docket No. 05-337, Developing an Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Lifeline and Link-Up, WC Docket No. 03-109, Universal Service Reform – Mobility Fund, WT Docket No. 10-208, *Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663, 17733 ¶¶ 299-300 (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).

targeted and efficient support than in the past.² For the first time, the Commission established a universal service support mechanism dedicated exclusively to mobile services—the Mobility Fund.³ In Phase I of the Mobility Fund, the Commission set aside up to \$300 million in one-time high-cost universal service support for carriers that committed to provide current- and next-generation mobile voice and broadband services in areas nationwide where such services were unavailable.⁴ The Commission decided that Phase I funding would be awarded through a reverse auction mechanism and delegated to the Wireless Telecommunications Bureau and the Wireline Competition Bureau (together, the “Bureaus”) authority to implement this program.⁵

4. Bidding in Auction 901 took place on September 27, 2012.⁶ Winning bids were placed by 33 bidders, which were eligible to receive up to a total of \$299,998,632 in one-time Mobility Fund Phase I universal service support.⁷ Winning bidders, such as GCI, were required to submit FCC Form 680, the post-auction long-form application, by November 5, 2012.⁸

5. *Auction 901 Bidding.* In the *USF/ICC Transformation Order*, the Commission determined that the census block should be the minimum geographic building block for which Mobility Fund Phase I support is provided, and delegated to the Bureaus authority to provide in the auction procedures process for aggregation of those minimum building blocks into larger units for bidding.⁹ In so doing, the Commission observed that Alaska presented a unique situation because the average size of census blocks in Alaska is more than 50 times the average size of census blocks in the other 49 States and bidding for areas in Alaska might be required on the basis of census blocks.¹⁰ Consistent with the Commission’s guidance in the *Auction 901 Comment Public Notice* the Bureaus contemplated that some aggregation of census blocks would be necessary because census blocks in most areas of the country are on average far smaller than the average area covered by a single cell tower, which is likely to be the minimum incremental geographic area of expanded coverage with Mobility Fund Phase I support.¹¹ Upon consideration of the record, the Bureaus established auction procedures providing that, with the exception of Alaska, bidders would be able to bid for support for the eligible census blocks in a census

² *Id.* at 17667 ¶ 1.

³ *Id.* at 17773 ¶¶ 299-300.

⁴ *Id.* at 17773 ¶ 299.

⁵ *USF/ICC Transformation Order*, 26 FCC Rcd at 17773, 17781, 17783 ¶¶ 299, 322, 329.

⁶ Mobility Fund Phase I Auction Closes; Winning Bidders Announced for Auction 901; FCC Form 680 Due November 1, 2012, AU Docket No. 12-25, *Public Notice*, 27 FCC Rcd 12031, 12032 ¶ 1 (WTB/WCB 2012) (*Auction 901 Closing Public Notice*).

⁷ *Id.*

⁸ The long-form filing deadline originally was scheduled for November 1, 2012, but was extended because of the disruption resulting from Hurricane Sandy. Mobility Fund Phase I Auction Long-Form Application Deadline Extended, AU Docket No. 12-25, *Public Notice*, 27 FCC Rcd 13424, 13424 ¶ 1 (WTB/WCB 2012).

⁹ *USF/ICC Transformation Order*, 26 FCC Rcd at 17787-88 ¶ 346; 47 C.F.R. § 54.1002(a).

¹⁰ *USF/ICC Transformation Order*, 26 FCC Rcd at 17788 ¶ 347. Census blocks are the smallest geographic unit for which the Census Bureau collects and tabulates decennial census data. Every census block fits within a census tract, and each census tract consists of multiple census blocks. *Id.* at 17787, n. 583.

¹¹ The Bureaus observed that the preliminary list of areas eligible for support through Auction 901 contained approximately 491,000 census blocks, that the average geographic area of these blocks is approximately 1.8 square miles. Mobility Fund Phase I Auction Scheduled for September 27, 2012; Comment Sought on Competitive Bidding Procedures for Auction 901 and Certain Program Requirements, AU Docket No. 12-25, *Public Notice*, 27 FCC Rcd 530, 538 ¶ 28 (WTB/WCB 2012) (*Auction 901 Comment Public Notice*).

tract, rather than on individual blocks.¹² For Alaska, however, bids were to be placed on the basis of census blocks (without any aggregation) because of the large average size of census blocks in Alaska.¹³ The Bureau recognized that “the average area of the Alaska census blocks on the preliminary list of eligible areas is approximately 40 square miles compared to an average area of approximately 1.1 square miles for blocks in the rest of the country,”¹⁴ and observed that “census blocks in Alaska may be closer in size to a minimum scale of buildout than are most blocks elsewhere.”¹⁵

6. *Letters of Credit for Long-form Application.* In the *USF/ICC Transformation Order*, the Commission decided that winning bidders in a Phase I reverse auction would be required to post LOCs as financial security prior to being authorized to receive Mobility Fund support.¹⁶ The Commission decided that an irrevocable stand-by LOC would be the best financial instrument to minimize the possibility that Mobility Fund support would become property of a recipient’s estate should it subsequently file for bankruptcy protection, thereby tying up the funds in the bankruptcy proceeding and preventing them from being used promptly to accomplish the Mobility Fund’s goals.¹⁷ The Commission concluded that such an instrument would protect the government’s interest in the funds it disburses in Mobility Fund Phase I.¹⁸ The Commission stated that LOCs must be issued in substantially the same form as set forth in the model LOC provided in the *USF/ICC Transformation Order*.¹⁹ Among other things, the model LOC provides that the Commission may draw upon the entire amount of the LOC in the event that the winning bidder defaults on its auction obligations or fails to perform.²⁰ Accordingly, the Commission’s Mobility Fund Phase I rules and procedures require that before it can be authorized to receive Mobility Fund Phase I support, a winning bidder must submit an acceptable LOC for each winning bid to secure its performance.²¹

7. *GCI’s Request for Waiver.* GCI was the only applicant with winning bids for Mobility Fund support in Alaska.²² GCI’s winning bids are situated in two census tracts encompassing the regional

¹² Mobility Fund Phase I Auction Scheduled for September 27, 2012; Notice and Filing Requirements and Other Procedures for Auction 901, AU Docket No. 12-25, *Public Notice*, 27 FCC Rcd 4725, 4762-63 ¶ 135 (WTB/WCB 2012) (*Auction 901 Procedures Public Notice*).

¹³ *Id.* at 4763-64 ¶ 139.

¹⁴ *Id.*

¹⁵ *Id.* Because a Mobility Fund Phase I recipient must provide 3G or 4G service to at least 75 percent of the road miles associated with the eligible blocks in each biddable area for which it won support, the establishment of the Alaska exception means that GCI’s coverage requirement will be measured on a block-by-block basis. *See Auction 901 Procedures Public Notice*, 27 FCC Rcd at 4764-65 ¶ 142.

¹⁶ *USF/ICC Transformation Order*, 26 FCC Rcd at 17810-11 ¶¶ 443-47.

¹⁷ *Id.* at 17811-12 ¶ 449.

¹⁸ *Id.* at 17811 ¶ 447.

¹⁹ *Id.* at 17810 ¶ 444, 18319-23 Appendix N.

²⁰ 47 C.F.R. § 54.1007(c)(1); *USF/ICC Transformation Order*, 26 FCC Rcd at 17811 ¶ 448; *see also* 47 C.F.R. § 54.1006(f). The LOC is required to be in an amount equal to the amount of Mobility Fund Phase I support received plus the established additional default payment percentage, which for Auction 901 was ten percent of the winning bid amount. 47 C.F.R. § 54.1007(a); *USF/ICC Transformation Order*, 26 FCC Rcd at 17810-11 ¶¶ 446-47; *Auction 901 Procedures Public Notice*, 27 FCC Rcd at 4777-78 ¶¶ 189-92.

²¹ 47 C.F.R. § 54.1005(b)(2)(vii); *USF/ICC Transformation Order*, 26 FCC Rcd at 17810 ¶ 444; *Auction 901 Procedures Public Notice*, 27 FCC Rcd at 4770-71 ¶¶ 169-170; *Auction 901 Closing Public Notice*, 27 FCC Rcd at 12036-37 ¶¶ 23-24.

²² *Auction 901 Closing Public Notice*, 27 FCC Rcd at 12045, Attachment A. After the close of the auction, GCI notified the Commission of its intent to default on some of its winning bids. *See* GCI Communication Corp., File No. 0005478853 (filed Nov. 5, 2012) (GCI Long-Form Application). The Bureau intends to make GCI’s long-form

(continued...)

hub city of Bethel and nine surrounding communities.²³

8. GCI initially submitted with its long-form application a request that it be permitted to submit a single LOC for the 218 winning bids for which it seeks support.²⁴ GCI later amended its request, seeking to submit 13 LOCs, one LOC for each upgrade to 13 towers in its existing cellular network that would provide coverage to the 218 census blocks.²⁵ In particular, GCI proposes equipment upgrades to each of the four towers covering the regional hub community of Bethel as well as to nine separate towers each covering one of nine other villages.²⁶ Each tower project would provide broadband coverage to multiple census blocks, ranging from as few as three blocks (covering the community of Kasigluk) to as many as 33 blocks (covering Kwethluk).²⁷

III. DISCUSSION

9. The Commission may waive its rules and requirements “for good cause shown.”²⁸ A waiver is appropriate only if “special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”²⁹ We may find that a rule waiver may serve the public interest where the waiver would not conflict with the policy underlying the rule.³⁰

10. We conclude that there is good cause for a partial grant of GCI’s request for relief from the LOC requirement here because of the special circumstances presented by these 218 winning bids, which cover areas significantly smaller than the average eligible census block in Alaska. This fact leads us to determine that it would be appropriate to allow GCI to aggregate separate block-based winning bids into groups that it asserts more closely approximate buildout so that GCI’s performance with respect to each group can be secured by a single LOC that is consistent with the Commission’s model LOC. Although, as the Commission observed, the average census block in Alaska is almost 50 times the average size of census blocks elsewhere in the country and is closer in size to a minimum scale of buildout, most of the blocks covered by GCI’s winning bids are one fourth the average size of census blocks elsewhere.³¹ GCI claims that the blocks covered by its winning bids are “much smaller than the

(...continued from previous page)

application publicly available, along with those of other Auction 901 winning bidders, following the completion of processing and authorization of support to all Auction 901 winning bidders.

²³ Bethel and the nine surrounding communities of Akiachak, Akiak, Atmautluak, Kasigluk, Kwethluk, Napakiak, Napaskiak, Nunapitchuk and Tuluksak are situated in the Yukon-Kuskokwim Delta region of southwestern Alaska.

²⁴ GCI also requested that its LOC covering multiple winning bids would permit the Commission to draw only a portion of the funds backed by the LOC rather than, as required under section 54.1007, the entire amount of the LOC. GCI Long-Form Application, Letter of Credit Waiver Attachment.

²⁵ GCI Communication Corp. Petition for Partial Waiver at 3 (dated March 1, 2013) (Request).

²⁶ *Id.*; see also GCI Long-Form Application, Project Description Attachments.

²⁷ GCI Long-Form Application, Project Description Attachments.

²⁸ See 47 C.F.R. §§ 1.3, 0.131(a).

²⁹ See, e.g., *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

³⁰ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1155, 1157 (D.C. Cir. 1969) (finding that the Commission may decide in some instances that rule waiver serves the public interest if an applicant’s proposal will not undermine the policy served by the rule). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983). Cf. 47 C.F.R. § 1.925(b)(3)(i).

³¹ *USF/ICC Transformation Order*, 26 FCC Rcd at 17788 ¶ 347; *Auction 901 Procedures Public Notice*, 27 FCC Rcd at 4763-64 ¶ 139; GCI Long-Form Application, Project Description Attachments.

‘minimum scale of buildout.’”³² For this reason GCI grouped its census blocks into 13 projects, each group of blocks being served by one tower.³³ The average area of the 218 census blocks covers 0.284 square miles. The area covered by each of GCI’s 13 project-based groupings of its winning bids is also significantly smaller than the average census block size in Alaska. GCI’s proposed groupings cover 4.8 square miles on average while the average size of Auction 901 eligible areas in Alaska (census blocks) exceeds 40 square miles.³⁴ These 13 groups of census blocks are consistent with the minimum scale of buildout in these areas based on the information provided in GCI’s project plans. Based on these facts, we find that the 13 projects are a reasonable way for GCI to aggregate census blocks for the purpose of providing LOCs to secure its Mobility Fund support. Because the census blocks in each grouping will be served by the same tower, any performance default by GCI with respect to one census block is very likely to be the cause of a performance default with respect to the remaining census blocks in the same project. For these reasons, we find that a waiver to allow GCI to submit an LOC for each of these 13 project-based groupings will not conflict with the policy underlying the rule. Moreover, the public interest will be served by allowing GCI to provide the required financial security and deploy new services to aggregations of census blocks in Alaska that are comparable to the tract-based aggregations in areas elsewhere. In this instance, the special circumstances described herein warrant a deviation from the general rule, and such deviation will serve the public interest.

11. Further, we find that grant of the waiver request would not conflict with the policies underlying the LOC requirement, which are to ensure that winning bidders have committed sufficient financial resources to meet the program obligations associated with Mobility Fund Phase I support and to protect the government’s interest in any disbursements of support.³⁵ GCI’s buildout plans, as described in its application, show that each group of winning bids that GCI proposes be covered by one LOC corresponds to a set of equipment upgrades at one of these 13 tower sites. GCI represents that it has sufficient financial resources for these projects and provides details of those plans in its long-form application. By providing an LOC for each site upgrade project, GCI will guarantee its performance in meeting its public interest obligations associated with its winning bids for Mobility Fund Phase I support and safeguard the government’s interest in any disbursements.

12. In granting such relief, we decline GCI’s request that we modify the terms and conditions in the model LOC adopted by the Commission in the *USF/ICC Transformation Order* to accept LOCs that allow for a partial draw upon the LOC, *i.e.*, a draw for less than the entire amount of the LOC. GCI’s request appears to be designed to limit the amount of support it would lose if it defaulted on, for example, a single census block within the group of census blocks linked to a project.³⁶ However, as discussed above, our waiver is predicated on GCI’s representation that each of its LOCs will cover one project, which consists of a group of census blocks that are located in close proximity and would receive new or improved broadband service by a single tower upgrade. Because each project consists of a set of closely-situated census blocks within a relatively compact geographic area that will receive upgraded service from a single tower/antenna, any failure by GCI to provide the required level of service to one census block in a group is likely to mean that GCI has failed to meet its program obligations with respect to all of the census blocks in that particular group. The Commission has explained that the purpose of the Mobility Fund is “to aggressively extend coverage,” and it specifically rejected a suggestion to permit

³² Request at 6.

³³ GCI Long-Form Application, Project Description Attachments.

³⁴ Mobility Fund Phase I Auction; Release of Files with Recalculated Road Miles for Auction 901; Mock Auction Rescheduled for September 21, 2012, AU Docket No. 12-25, *Public Notice*, 27 FCC Rcd 10890 (WTB/WCB 2012); GCI Long-Form Application, Project Description Attachments.

³⁵ *USF/ICC Transformation Order*, 26 FCC Rcd at 17810-11 ¶¶ 443-447.

³⁶ See Request at 5.

funding for “a level of service that falls short of the required percentage of coverage.”³⁷ Accordingly, in adopting a model LOC, the Commission elected to use a bright-line approach under which any default would trigger a draw of the entire amount of the letter of credit.³⁸ Such an approach furthers the Commission’s objective of extending mobile broadband coverage to unserved areas by ensuring that only those projects that meet or exceed the required minimum levels of buildout receive support. Since, based on GCI’s representations, the likelihood of default by GCI on one or two blocks within any grouping is remote, we are not persuaded that allowing partial draws on GCI’s LOCs would serve the public interest.

13. In the event of default by GCI, the Commission would draw the entire amount of the particular LOC as required under section 54.1007(c).³⁹ To the extent that GCI believes the projects it has described in its application present the possibility that it could default on its performance obligations in one census block without defaulting on such obligations in other census blocks within the same project, GCI is free to alleviate any concerns it has about a draw on the entire amount of the LOC by eliminating the risk of such a scenario occurring. To avoid such a scenario, GCI can simply provide us with any number of additional LOCs beyond the minimum 13 LOCs that we allow by our waiver, and by doing so, ensure that its default in certain census blocks does not cause it to lose Mobility Fund support for other census blocks in the same project where it has met all of its performance obligations.

14. In reaching our conclusion, we have found unpersuasive GCI’s claims that “imbalance and inequity” relative to other parties merit the requested relief.⁴⁰ Thus, we do not base our decision on GCI’s arguments asserting that the average amount of an LOC that GCI would otherwise be required to provide would be lower than the LOCs of other bidders.⁴¹ Similarly, we are not persuaded by GCI’s arguments that bank fees associated with issuing each LOC or the administrative burdens of obtaining the requisite number of LOCs justify relief from this requirement.⁴² The Bureaus rejected such cost-based objections in the *Auction 901 Procedures Public Notice*, noting that applicants would have the opportunity to factor such costs into their bid amounts.⁴³ GCI also argues that we should grant it relief because we have previously granted a waiver to allow Auction 901 winning bidders to use CoBank, ACB (“CoBank”) as an issuing bank for LOCs, even though CoBank did not meet all of the specific requirements set forth in section 54.1007(a)(1).⁴⁴ GCI fails to explain how our determination in that case, which was based on our analysis of CoBank’s size, authority, credit rating, and experience, relates to GCI or its specific circumstances.⁴⁵ We do not agree with GCI’s suggestion that our finding in that case that grant of a waiver of section 54.1007(a)(1) to accept LOCs issued by CoBank would not conflict with the policy underlying the rule somehow compels us to grant relief to GCI in the instant matter.⁴⁶

³⁷ *USF/ICC Transformation Order*, 26 FCC Rcd at 17816 ¶ 469.

³⁸ *See* 47 C.F.R. § 54.1007(c).

³⁹ *See* 47 C.F.R. § 54.1007(c)(1)-(2). *See also USF/ICC Transformation Order*, 26 FCC Rcd at 17811 ¶ 448.

⁴⁰ *See* Request at 4.

⁴¹ *See id.* at 4-5.

⁴² *See id.* at 6. GCI’s arguments assume that it would incur “a conservative [bank] fee of \$250 per LOC.”

⁴³ *Auction 901 Procedures Public Notice*, 27 FCC Rcd at 4771-72 ¶ 172 (“All applicants for Mobility Fund Phase I support are able to factor the cost of meeting this [LOC] requirement into their bid amounts, and we find that the best course of action is to apply the requirement consistently so that all applicants are subject to the same requirements and calculate their bids accordingly.”).

⁴⁴ *See* Request at 7-8, citing Waiver of Section 54.1007(a)(1) of the Commission’s Rules, *Order*, 27 FCC Rcd 13457 (2012).

⁴⁵ *See* Waiver of Section 54.1007(a)(1) of the Commission’s Rules, *Order*, 27 FCC Rcd 13457 (2012).

⁴⁶ *See* Request at 7-8.

15. For the reasons stated above, we waive the requirement that a winning bidder submit an LOC for each winning bid to allow Auction 901 winning bidder GCI to submit no fewer than 13 irrevocable stand-by LOCs with its long-form application for Mobility Fund Phase I support. We further find that in these circumstances grant of the waiver serves the public interest by taking into account the unique circumstances of GCI's winning bids and ensuring that an appropriate guarantee of performance is in place to ensure the expansion of 3G or better mobile voice and broadband service to the ten Alaska communities covered by these 218 winning bids. We deny GCI's request for waiver of section 54.1007(c) of the Commission's rules to allow for partial draw on any of its LOCs.

IV. ORDERING CLAUSES

16. 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 of 1934, as amended, 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, the Auction 901 requirement that a winning bidder submit a letter of credit for each winning bid is waived to the extent described herein.

17. IT IS FURTHER ORDERED that a copy of this order SHALL BE transmitted by the Office of the Secretary to the Universal Service Administrative Company; and

18. 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