

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

In the Matter of)	
)	
SAL Spectrum, LLC)	
Application to Participate in Auction 1002;)	
Request for Waiver of Eligibility Standard for)	
Rural Service Provider Bidding Credit)	
)	
Competitive Bidding Procedures for Broadcast)	AU Docket No. 14-252
Incentive Auction 1000, Including Auctions 1001)	
and 1002)	
)	
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	

ORDER

Adopted: July 29, 2016

Released: July 29, 2016

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we deny the petition for waiver filed by Atlantic Tele-Network, Inc. (ATN), and its wholly-owned subsidiary SAL Spectrum, LLC (SAL) (together Petitioners), seeking eligibility for a rural service provider bidding credit in Auction 1002 based on a count of only the domestic subscribers and excluding foreign subscribers of the applicant and its affiliates.¹ For the reasons set forth below, we conclude that Section 1.2110(f)(4)(i)(A) of the Commission's rules,² which limits eligibility for the rural service provider bidding credit to providers with fewer than 250,000 subscribers, does not distinguish between domestic and foreign subscribers, and thus SAL is required to attribute to itself the subscribers of its foreign affiliates. We further conclude that Petitioners have not demonstrated a sufficient basis for waiving that requirement.

II. BACKGROUND

2. On July 21, 2015, the Commission released the *Part 1 Report and Order*, which modernized and reformed the Commission's Part 1 competitive bidding rules to reflect changes in the wireless industry over the last decade.³ The Commission modified the Part 1 rules in certain respects to provide greater opportunities for entities to compete for spectrum licenses at auctions. To further this

¹ See Petition for Waiver, FCC Form 175 File No. 0007122225 (filed with WTB May 3, 2016) (Waiver Petition). Atlantic Tele-Network, Inc., has since notified us that it has changed its name to ATN International, Inc.

² 47 CFR § 1.2110(f)(4) (eligibility standard for rural service provider bidding credit).

³ *Updating Part 1 Competitive Bidding Rules*, Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, Third Report and Order, 30 FCC Rcd 7493 (2015) (*Part 1 Report and Order*).

objective, the *Part 1 Report and Order* established, among other things, a 15 percent bidding credit for eligible rural service providers.⁴ To be eligible for a rural service provider bidding credit, an applicant must be a service provider that: (1) is in the business of providing commercial communications services and, together with its controlling interests, affiliates, and the affiliates of its controlling interests, has fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers; and (2) serves predominantly rural areas, defined as counties with a population density of 100 or fewer persons per square mile.⁵ The combined subscribers of the applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests “shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated.”⁶

3. On October 15, 2015, the Bureau released the *Application Procedures Public Notice*, which provided detailed information and instructions for potential applicants for the broadcast incentive auction.⁷ With respect to the forward auction (Auction 1002), the public notice cited the Commission’s new rule regarding eligibility for the rural service provider bidding credit and explained the disclosures required in the forward auction application (FCC Form 175).⁸ In particular, an applicant seeking a rural service provider bidding credit must disclose “the number of subscribers it has, along with the number of subscribers of its affiliates, controlling interests, and the affiliates of its controlling interests.”⁹

4. On February 4, 2016, SAL submitted an application to participate in Auction 1002, which included a claim for a rural service provider bidding credit.¹⁰ To support its claim, SAL submitted subscriber numbers for itself and certain affiliates in its application, as well as an attachment asserting the basis for its eligibility for the bidding credit.¹¹ In this initial filing, SAL provided the number of wireless, wireline, broadband, and cable subscribers for only those affiliates operating in the United States. Although SAL sought confidentiality as to that number,¹² according to Petitioners’ subsequently filed Waiver Petition described below, for which they did not seek confidential treatment, those subscribers totaled “slightly more than 62,000.”¹³ The Bureau subsequently determined that SAL’s application was incomplete and identified specific application deficiencies in a letter sent to SAL.¹⁴

⁴ *Id.* at 7530-31, para. 88.

⁵ 47 CFR § 1.2110(f)(4)(i).

⁶ 47 CFR § 1.2110(f)(4)(i)(C).

⁷ *Application Procedures for Broadcast Incentive Auction Scheduled To Begin on March 29, 2016; Technical Formulas for Competitive Bidding*, Public Notice, 30 FCC Rcd 11034 (WTB 2015) (*Application Procedures Public Notice*).

⁸ *Id.* at 11074-75, paras. 123-24.

⁹ *Id.* at 11074, para. 124.

¹⁰ Waiver Petition at 3.

¹¹ *See id.*

¹² Petitioners’ confidentiality request was denied. *See SAL Spectrum, LLC – Request for Confidential Treatment of Subscriber Information Provided in FCC Form 175*, Letter Order, 31 FCC Rcd 3726 (WTB/ASAD 2016). Concurrently with the Waiver Petition, Petitioners filed an Application for Review of the denial, requesting that the Commission delay addressing the Application for Review until the Bureau decides the Waiver Petition. *See SAL Spectrum, LLC, Application To Participate in Auction 1002*, File No. 0007122225, Application for Review at 4 (filed May 3, 2016) (*Application for Review*). In their Application for Review, Petitioners indicated that if their Waiver Petition were denied, they would withdraw their claim for a bidding credit and the Application for Review would become moot. *Id.* at 4 n.12.

¹³ Waiver Petition at 3.

¹⁴ *See Status of Applications To Participate in the Broadcast Television Spectrum Incentive Forward Auction (Auction 1002); Applications Deemed Incomplete Must Be Resubmitted by April 6, 2016*, Public Notice, 31 FCC

(continued....)

5. During the resubmission filing period afforded to Auction 1002 applicants to address deficiencies in their applications, SAL revised its FCC Form 175, and re-submitted it on April 6, 2016.¹⁵ This time, SAL included with its application an attachment that provided a general range of the total number of subscribers for three foreign affiliates of SAL.¹⁶ In addition to its U.S. subscribers, the Waiver Petition later disclosed that SAL's foreign affiliates in Guyana, Bermuda, and Aruba collectively serve an unspecified number of – but “more than 250,000” – wireline, wireless, broadband, and cable subscribers,¹⁷ and that the total number of SAL's and its affiliates' subscribers is “fewer than 500,000.”¹⁸ SAL argues in the attachment to its application that subscribers of foreign affiliates should not be counted in assessing eligibility for this bidding credit.¹⁹ SAL further states that it intends to seek clarification from the Commission on this issue prior to the start of the forward auction clock phase.²⁰

6. On May 3, 2016, ATN and SAL filed a petition requesting, to the extent necessary, waiver of Section 1.2110(f)(4) of the Commission's rules, to enable SAL to claim eligibility for a rural service provider bidding credit in Auction 1002. Petitioners claim that the “plain meaning and context” of the rural service provider bidding credit eligibility requirement “suggest that only domestic subscribers” should be counted, but that the *Part 1 Report and Order* “creates some ambiguity” with respect to whether an applicant must also count its foreign subscribers.²¹ To the extent the rule does in fact require the inclusion of foreign subscribers, Petitioners seek a waiver so that SAL can claim eligibility for a rural service provider bidding credit in Auction 1002.²² Petitioners claim that due to ATN's limited domestic operations and relatively small overall size, SAL “is precisely the type of auction applicant the Commission intended to benefit” with this bidding credit and that SAL's ability to compete in Auction 1002 would be “significantly impeded” in the absence of a bidding credit.²³ Moreover, Petitioners assert that SAL would be prejudiced by having to compete against other rural service providers that are eligible for a bidding credit.²⁴ According to Petitioners, a waiver would further the public interest by encouraging greater deployment of wireless services in rural areas.²⁵

7. On May 11, 2016, the Bureau released a public notice seeking comment on the Petition.²⁶ Ten parties filed largely identical letters in support of the Petition, expressing appreciation for ATN's deployment of service to their rural or tribal areas and asserting that providing SAL with a bidding credit

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Rcd 1962, 1974 (WTB 2016).

¹⁵ Waiver Petition at 3.

¹⁶ FCC Form 175 of SAL Spectrum, LLC, Auction 1002, “Eligibility for Rural Bidding Credit – Supplemental,” at 1 (submitted Apr. 6, 2016) (Attach.). We note that SAL did not disclose the names of the foreign affiliates or their subscribers in the application itself.

¹⁷ Waiver Petition at 3.

¹⁸ *Id.*

¹⁹ Attach. at 1.

²⁰ *Id.*

²¹ Waiver Petition at 4.

²² *Id.*

²³ *Id.* at 6, 8.

²⁴ *Id.* at 11.

²⁵ *Id.* at 9.

²⁶ See *Wireless Telecommunications Bureau Seeks Comment on Atlantic Tele-Network, Inc., and SAL Spectrum, LLC, Petition for Waiver To Claim Eligibility for a Rural Service Provider Bidding Credit in Auction 1002*, Public Notice, DA 16-516 (WTB/ASAD May 11, 2016).

would further additional rural deployment.²⁷ N.E. Colorado Cellular, Inc., and Union Telephone Company filed joint comments arguing that the plain meaning of Section 1.2110(f)(4) does not permit an applicant to exclude foreign subscribers.²⁸ They also oppose the grant of a waiver to SAL, claiming the public interest would not be served in light of ATN's foreign affiliates and subscribers (which are increasing via new acquisitions of foreign subscribers)²⁹ and overall financial strength, as demonstrated by its nearly \$1.2 billion market capitalization and nearly \$17 million profit in 2015, as well as SAL's inability "to claim any difficulty accessing capital at favorable rates, or otherwise competing for spectrum in rural areas."³⁰

8. The only reply comments were filed by Petitioners. In their reply, Petitioners argue that their financial size "is simply not a factor" in determining eligibility for the rural service provider bidding credit and that the rule's failure to specifically include foreign subscribers creates ambiguity.³¹ In addition, Petitioners assert that their limited success in Auction 73 demonstrates their need for a bidding credit "to compete effectively" in Auction 1002.³² Petitioners further contend that the publicly released application information demonstrates that SAL is uniquely situated since no other applicant seeking the rural service provider bidding credit has "significant international operations" and that nine other applicants seeking the bidding credit have more domestic subscribers than Petitioners.³³

III. DISCUSSION

9. We conclude that Section 1.2110(f)(4)(i)(A) of the Commission's rules requires that SAL attribute to itself all the subscribers of its foreign affiliates. The rule is clear that an applicant must attribute all subscribers of the applicant, its affiliates, its controlling interests and the affiliates of its controlling interests; there are no exclusions from attribution depending upon where such subscribers are located.³⁴

²⁷ See, e.g., Letter from Linda Calhoun, Town of Red River, NM, to Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC (filed May 19, 2016); Letter from Phil Lyman, San Juan County, UT, Commission, to Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC (filed May 19, 2016); Letter from Walter W. Haase, Navajo Tribal Utility Authority, to Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC (filed May 19, 2016); Letter from Russell Begaye, Navajo Nation, to Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC (filed May 19, 2016); Letter from Llevando Fisher, Northern Cheyenne Tribe Administration, to Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC (filed May 25, 2016); Letter from Cindy Dozier, Hinsdale County, CO, Board of County Commissioners, to Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC (filed May 25, 2016); Letter from LoRenzo C. Bates, 23rd Navajo Nation Council, Office of the Speaker, to Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC (filed May 26, 2016); Letter from Janelle Kukuk, Mineral County, CO, Board of Commissioners, to Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC (filed May 26, 2016); Letter from Q. Val Hale, Utah Governor's Office of Economic Development, to Tom Wheeler, Chairman, FCC (filed May 31, 2016); Letter from Godfrey Enjady, National Tribal Telecommunications Association, to Jon Wilkins, Chief, Wireless Telecommunications Bureau, FCC (filed June 2, 2016) (NTTA Letter). Certain of those parties also note that the Commission did not consider ATN's foreign operations when providing a tribal land bidding credit in the 700 MHz auction. See, e.g., NTTA Letter at 2.

²⁸ See N.E. Colorado Cellular, Inc., and Union Telephone Company Comments at 2 (N.E. Colorado Comments).

²⁹ N.E. Colorado Cellular, Inc., and Union Telephone Company cite two recent acquisitions by ATN, including one with a purchase price of \$145 million. See *id.* at 4-5.

³⁰ *Id.* at 3-4.

³¹ Petitioners Reply at 3-4.

³² *Id.* at 7.

³³ *Id.* at 9, 11.

³⁴ 47 CFR § 1.2110(f)(4).

10. The Commission adopted the subscriber threshold in Section 1.2110(f)(4)(i)(A) as a mechanism to limit the rural service provider bidding credit to entities that serve a smaller customer base and exclude entities that “do not have the same demonstrated need for a bidding credit.”³⁵ As the Commission made clear, the bidding credit is intended to apply to only those rural providers that are “relatively small [but] not eligible for small business bidding credits under our size standards to assist them in competing against larger carriers at auction.”³⁶ The Commission explained that it will determine whether a provider has fewer than 250,000 subscribers using “an approach similar to how we attribute revenues in the small business bidding credit context, and will determine eligibility by attributing the subscribers of the applicant, its controlling interests, its affiliates, and the affiliates of its controlling interests.”³⁷ The Commission rejected an alternative proposal that would not have required aggregating affiliates’ subscribers because it sought to avoid awarding a bidding credit to an applicant that would “likely have access to the financial resources of its controlling interests and affiliates,” concluding that such approach “would be inequitable and contrary to our policy of providing a bidding credit to those designated entities that have difficulty in obtaining access to capital.”³⁸ This focus on the availability of financial resources of affiliates is no less applicable to affiliates operating outside the U.S. but under common control.³⁹ Given the language of the Commission’s rule, and its explanatory statements in the *Part 1 Report and Order*, we find no basis for Petitioners’ assertion that “[f]inancial size” and access to capital are “irrelevant” in the rural service provider bidding credit context.⁴⁰ The policy rationale is similar to that which applies to the eligibility standards for the small business bidding credit, which contain no exclusions from attribution to an applicant of revenues of all its controlling interests, affiliates, and affiliates of the applicant’s controlling interests without regard to where such entities operate or whether the applicant actually avails itself of those financial resources. Accordingly, as specified in the *Part 1 Report and Order*, we require a consistent attribution approach for the rural service provider bidding credit with respect to subscribers.⁴¹

11. Our interpretation of the Commission’s rule is also in step with precedent for analogous purposes outside the auction bidding credit context. In *C-TEC Cable*, C-TEC sought to qualify for small system rate relief, which was limited to companies with fewer than 400,000 subscribers.⁴² Because it surpassed that threshold only when the subscribers of its foreign affiliate were included, C-TEC argued

³⁵ *Part 1 Report and Order*, 30 FCC Rcd at 7534, para. 98.

³⁶ *Id.* at 7531, para. 91.

³⁷ *Id.* at 7535, para. 99. The Commission adopted the subscriber attribution rule in Section 1.2110(f)(4)(i)(C). See 47 CFR § 1.2110(f)(4)(i)(C) (aggregating subscribers of “applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests”).

³⁸ *Part 1 Report and Order*, 30 FCC Rcd at 7535, para. 100.

³⁹ Contrary to Petitioners’ suggestion, the Commission had no obligation to catalog each category of subscribers in order for it to be covered by the rule. See N.E. Colorado Comments at 2, 5 (“If the Commission had intended for the rule’s subscriber calculation to encompass only American subscribers, it could have written the rule to say so.”).

⁴⁰ Petitioners Reply at 3.

⁴¹ Notwithstanding the Commission’s adoption of a similar attribution approach in the *Part 1 Report and Order*, Petitioners attempt to distinguish the eligibility criteria for the two bidding credits by arguing that the Commission never equated revenues with subscribers in the *Part 1 Report and Order* and that revenues are fungible, while subscribers are not. See *id.* Even if so, as discussed above, the Commission has adopted revenue- and subscriber-based standards, both of which are intended to exclude well-financed applicants from obtaining bidding credits intended for entities that lack adequate access to capital. While subscribers may not be perfectly equivalent to revenues, subscribers – whether domestic or foreign – generate a monthly revenue stream to a service provider, which can become a substantial source of capital as the number of subscribers increases.

⁴² *C-TEC Cable System of Michigan, Inc.*, 11 FCC Rcd 6189 (Cable Serv. Bur. 1996) (*C-TEC Cable*), recon. denied in pertinent part, 13 FCC Rcd 16488, para. 6 (Cable Serv. Bur. 1998).

that the threshold was limited to domestic subscribers.⁴³ The Cable Services Bureau rejected this argument.⁴⁴ After observing that the Commission's pertinent order could have easily restricted the threshold to domestic subscribers if it had intended to do so, the Bureau explained that the Commission intended the subscriber threshold to "limit relief to those systems that 'do not have access to the financial resources, purchasing discounts, and other efficiencies of larger companies.'"⁴⁵ The Bureau found "no basis to conclude that such efficiencies, including factors such as cable management expertise and programming and equipment discounts, are less significant simply because some of the subscribers from which those efficiencies derive are foreign."⁴⁶

12. Petitioners rely on the fact that they satisfy the second requirement for eligibility for the bidding credit, which concerns service to predominantly rural areas of the United States.⁴⁷ However, the two requirements are separate and distinct: one is based on the provider's likely access to capital and other resources as measured by subscribers, and the other focuses on whether the provider serves predominantly rural areas in the United States. For the reasons stated above, we are unable to conclude from an examination of its language and purpose that the rule excludes Petitioners' foreign affiliates from attribution to SAL for purposes of determining SAL's eligibility for a rural service provider bidding credit.

13. To receive a waiver under Section 1.925 of the Commission's rules, Petitioners must demonstrate 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 waiver would be in the public interest, or (2) in view of the 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 that the applicant has no reasonable alternative to seeking a waiver of the rule.⁴⁸ Based on the record before us, we conclude that the waiver request should be denied.

14. With respect to the first prong of the waiver standard, Petitioners argue that the purpose of the rural service provider bidding credit rule is to "encourage significant competition in the Incentive Auction for licenses in rural areas," and that this regulatory purpose would be frustrated if we attribute the subscribers of Petitioners' foreign affiliates to SAL and thus determine SAL to be ineligible for a bidding credit.⁴⁹ Petitioners claim that due to ATN's limited domestic operations and relatively small overall size, SAL "is precisely the type of auction applicant the Commission intended to benefit" with this bidding credit and that SAL's ability to compete in Auction 1002 would be "significantly impeded" in the absence of a bidding credit.⁵⁰ We find that Petitioners have not demonstrated that they satisfy the first prong of the waiver standard.

15. Petitioners have not shown that the application of the eligibility rule would frustrate the underlying purpose of the rural service provider bidding credit as required by Section 1.925(b)(3)(i). Indeed, we find the opposite. As discussed above, the Commission established an eligibility standard based on total subscribers to define the class of providers that need the bidding credit and exclude

⁴³ *C-TEC Cable*, 11 FCC Rcd at 6194-95, paras. 14-15.

⁴⁴ *Id.* at 6194-95, para. 15.

⁴⁵ *Id.* at 6195, para. 15 (quoting *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995)).

⁴⁶ *Id.*

⁴⁷ See Waiver Petition at 4, 7 n.5; Petitioners Reply at 4.

⁴⁸ See 47 CFR §§ 1.925(b)(3)(i)-(ii).

⁴⁹ Waiver Petition at 7 (quoting *Part 1 Report and Order*, 30 FCC Rcd at 7537, para. 106); Petitioners Reply at 6-7.

⁵⁰ Waiver Petition at 6, 8; Petitioners Reply at 7.

providers that do not have the same need for the credit.⁵¹ Notably, the Commission concluded that a threshold of fewer than 250,000 subscribers “is large enough to permit rural service providers to seek spectrum licenses at auction, expand their coverage areas, grow their subscriber base, and continue to be eligible for bidding credits in future spectrum auctions.”⁵² Petitioners contend that their total of fewer than 500,000 worldwide subscribers makes them a “small player” relative to other telecommunications firms.⁵³ That number of subscribers is well above the rule’s threshold of fewer than 250,000 subscribers. Accordingly, we are unable to determine that SAL falls within the class of providers the Commission intended to benefit with a rural service provider bidding credit and therefore conclude that application of the eligibility standard would promote, not frustrate, the underlying purpose of the rule to limit the benefit of the bidding credit based on likely access to capital and other resources.⁵⁴ In this regard, we note that ATN has itself made note of its “lower cost of capital.”⁵⁵ Similarly, in its recently granted applications to acquire incumbent local exchange, wireless, and cable subscriber operations in the U.S. Virgin Islands, ATN has again emphasized the acquired companies’ “access to capital on favorable terms . . . [a]s part of ATN’s consolidated businesses.”⁵⁶

16. We are also unpersuaded by Petitioners’ contention that we should waive the eligibility requirement and allow SAL to claim eligibility for a rural service provider bidding credit to “level the playing field with other rural service providers” and place SAL “on an equal footing with its auction competitors.”⁵⁷ It is far from clear that competition in the auction or the provision of competitive services would be advanced by granting a waiver in these circumstances as asserted by Petitioners.⁵⁸ While SAL itself would likely benefit from a 15 percent bidding credit, it is the Commission’s oft-stated policy to protect and enhance competition, not competitors.⁵⁹ SAL’s justification is limited to its own difficulty winning licenses and is therefore unpersuasive.⁶⁰ In this case, other applicants would almost certainly be prejudiced by a waiver. That is, rural bidders with fewer than 250,000 subscribers would have to compete for spectrum licenses with the same bidding credit against SAL with its expanding worldwide subscriber

⁵¹ See *Part 1 Report and Order*, 30 FCC Rcd at 7534-35, para. 98.

⁵² *Id.*

⁵³ Petitioners assert that they have fewer than 500,000 worldwide subscribers, see Waiver Petition at 3, though it is not clear whether this figure includes Petitioners’ recent merger and acquisition activity, see *infra* n.56.

⁵⁴ We are not inclined to revisit in the context of a waiver request the Commission’s decision to set the threshold at 250,000 subscribers, for those applicants, such as SAL, that claim to come close and do not surpass some new threshold. Indeed, the Commission has cautioned the Bureau against using the waiver process to create ad hoc standards in the auction context. See *Barry P. Lunderville et al.*, Memorandum Opinion and Order, 28 FCC Rcd 665, 672-73, paras. 15-18 (2013).

⁵⁵ Atlantic Tele-Network, Inc., Annual Report (Form 10-K), at 2 (Feb. 29, 2016) (ATN 10-K).

⁵⁶ Description of Proposed Transaction, Public Interest Statement, and Related Requests and Showings at 18 (WC Docket No. 15-264) (filed Oct. 30, 2015). See also *id.* at ii (“superior access to capital”); *Applications of National Rural Utilities Cooperative Finance Corporation and Atlantic Tele-Network, Inc. for Consent To Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, DA 16-673, para. 36 & n.112 (WCB/IB/MB/WTB June 15, 2016) (granting transfer of control applications and expecting the combined company to have “greater purchasing power” due to ATN’s cash and cash equivalent holdings and ATN’s existing credit facility with no borrowings).

⁵⁷ Petitioners Reply at 11.

⁵⁸ See Petitioners Reply at 8.

⁵⁹ See, e.g., *Bell Atlantic Mobile Systems and NYNEX Mobile Communications Co.*, Memorandum Opinion and Order, 12 FCC Rcd 22280, 22288 (1997); *SBC Communications Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

⁶⁰ See Petitioners Reply at 7-8. In any event, Petitioners acknowledge that predicting different outcomes of Auction 73 if SAL would have had a bidding credit is speculative. See *id.* at 8 n.23.

base.⁶¹ Petitioners assert that SAL needs the bidding credit because nine applicants claiming the rural service provider bidding credit serve more domestic subscribers than do SAL and its affiliates.⁶² In so doing, Petitioners ignore their foreign subscribers and overlook the converse interpretation of the application data – i.e., that 19 applicants serve *fewer* domestic subscribers than SAL, yet would have to compete with the same bidding credit if a waiver were granted to SAL.⁶³ At the same time, certain larger providers that are ineligible for a bidding credit would be handicapped bidding against a similarly situated provider that has a bidding credit.⁶⁴ Neither potential outcome is in the public interest.

17. In addition, granting a waiver would not be in the public interest because the Commission chose to adopt a bright-line subscriber threshold, which provides certainty for all prospective auction participants with respect to whether an applicant would qualify for a rural service provider bidding credit. The administrative efficiency associated with such a rule would be undermined if the Commission were required to engage in a case-by-case examination of an applicant’s financial resources and conclude whether an applicant may need a bidding credit to compete effectively in an auction. A similar burden would result if we were to take on the task of assessing the income and spending habits of consumers throughout the world, as Petitioners suggest we do with respect to its affiliate serving Guyana.⁶⁵ Granting Petitioners a waiver of the rural service provider bidding credit eligibility rule would lay the groundwork for similar future waiver requests to obtain bidding credits. For this reason, the Bureau has routinely rejected waiver requests from applicants when the strict requirements to qualify for bidding credits have not been met.⁶⁶ And as the Commission recently stated, “our duty to preserve the integrity of the auction

⁶¹ See *supra* n.56. N.E. Colorado Cellular, Inc., and Union Telephone Company indicate that ATN’s market capitalization is nearly \$1.2 billion and ATN’s annual revenue in 2015 was over \$355 million. See N.E. Colorado Comments at 3. They further claim that ATN “has access to public markets and is able to borrow funds at rates not available to small companies.” *Id.* As noted above, rather than attempt to rebut the substance of this argument, Petitioners simply characterize their financial resources as “irrelevant.” Petitioners Reply at 3.

⁶² See *id.* at 11.

⁶³ Further, we cannot be certain that other parties might have applied to participate in Auction 1002 and/or seek a rural service provider bidding credit had the rule provided an exemption from attribution all foreign subscribers of an applicant and its affiliates.

⁶⁴ Petitioners acknowledge that there are 17 Auction 1002 applicants that did not claim eligibility for a bidding credit. See Petitioners Reply at 9. Although Petitioners assert that none is similarly situated to SAL, Petitioners wrongly limit their inquiry to domestic – not worldwide – subscribers. *Id.* Accordingly, we are not convinced that Petitioners have made the requisite showing that SAL is unique and that a bidding credit would not impair competition with these applicants.

⁶⁵ Petitioners provide Guyana’s population and monthly average revenue per user (ARPU) and assert that their foreign affiliates serve less developed markets. See Waiver Petition at 11; Letter from Jonathan V. Cohen, Counsel for ATN International, Inc., to Marlene H. Dortch, Secretary, FCC, AU Docket No. 14-252 et al., at 1-2 (filed June 30, 2016).

⁶⁶ See *Maritime Communications/Land Mobile LLC*, Order, 21 FCC Rcd 13735 (WTB MD 2006) (denying request to waive spousal affiliation rule when applicant sought very small business bidding credit); *Corr Wireless Communications, LLC, Auction No. 44, Waiver Request*, Letter Order, 18 FCC Rcd 25153 (WTB/ASAD 2003) (denying request to exclude one-time, capital gain income from annual revenues for purposes of qualifying for very small business bidding credit). Petitioners cite just one order as precedent for a waiver here. See Petitioners Reply at 12 n.33 (citing *Cross Wireless, LLC Waiver of Section 54.1003(a) of the Commission’s Rules*, Order, 28 FCC Rcd 12849 (WTB/ASAD 2013) (*Cross Wireless*)). But *Cross Wireless* did not involve an applicant’s petition for waiver so that it could qualify for a bidding credit. Rather, on our own motion, we granted Cross a waiver post-auction so as not to disturb Cross’s winning Mobility Fund Phase I support in three census tracts due to a two-week administrative delay in obtaining ETC status. See *id.* at 12851-52, paras. 6-9.

process requires the certain and strict application of the auction rules and that it would be fundamentally unfair to do otherwise.”⁶⁷

18. In sum, the purpose of the subscriber threshold was to establish a clear-cut standard by which the Commission determines those rural providers that should be eligible for the bidding credit based upon the same “consolidated” position of the applicant and all its affiliates that ATN has elsewhere emphasized.⁶⁸ While Petitioners argue that we should waive that standard based on a finding that it is a rural provider the Commission intended to benefit,⁶⁹ that argument presumes the very issue in question that the rule was intended to resolve. Case-by-case determinations that an applicant is eligible to receive the bidding credit based on its service to rural areas would frustrate the purpose of the rule, and following the rule here would serve its purpose, rather than frustrate it. Uniform application of the rule will best serve its underlying purpose, and, accordingly, the public interest.

19. Petitioners have also failed to meet the second prong of the Section 1.925(b)(3) waiver standard.⁷⁰ We are not persuaded that the existence of “significant international operations” and associated foreign subscribers is a unique or unusual circumstance such that application of the rule would be inequitable, unduly burdensome or contrary to the public interest.⁷¹ Petitioners also cite as unique “ATN’s commitment to serving underserved rural and remote areas,” including tribal lands, and claim that because their foreign affiliates (and subscribers) were never previously considered when competing for federal grants or tribal bidding credits, it would be inequitable and unduly burdensome to consider them when determining eligibility for a bidding credit in Auction 1002.⁷² We do not consider Petitioners’ prior service history to be a unique circumstance warranting a waiver.⁷³ Not all existing rural service

⁶⁷ *John Edward Ostlund and Hilo Broadcasting, LLC*, Memorandum Opinion and Order, 30 FCC Rcd 14918, 14919, para. 3 (2015) (internal quotation omitted) (denying waiver of interference limits). *See also Mary V. Harris Foundation v. FCC*, 776 F.3d 21, 28-29 (D.C. Cir. 2015) (upholding Commission decision regarding award of a noncommercial educational (NCE) FM construction permit in case in which Media Bureau had denied waiver of rule requiring showing of NCE service to 10% underserved area, to applicant proposing a 9.46% underserved area where the bright-line threshold had been adopted to provide easy administration of NCE selection preferences); *Requests for Waiver of Section 24.711(b)(3) of the Commission’s Rules Establishing the Interest Rate on Installment Payments for C Block PCS Licenses*, Memorandum Opinion and Order, 14 FCC Rcd 9298, 9302, para. 7 (1999) (“[A] strict adherence to a general rule may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases.”) (internal quotation omitted).

⁶⁸ *See supra* para. 15 & nn.55-56; ATN 10-K at 6 (reporting consolidated revenues for wireline services in Guyana and the United States).

⁶⁹ *See* Waiver Petition at 6.

⁷⁰ 47 CFR § 1.925(b)(3)(ii).

⁷¹ Petitioners Reply at 9.

⁷² *See* Waiver Petition at 9-11; Petitioners Reply at 9-10. Tribal commenters also cite Petitioners’ ability to obtain the tribal land bidding credit in the 700 MHz auction, which purportedly facilitated LTE deployment. *See, e.g.*, NTTA Letter at 2.

⁷³ We recognize that many regulated providers provide essential services to the public, but that alone is insufficient to satisfy the established standard for waiver of Commission rules. *See Satellite Signals of New England, Inc.*, Order, 22 FCC Rcd 1937, 1946, para. 17 (WTB 2007) (“Neither an asserted intent to provide service to rural areas nor actual service to rural areas warrants a waiver”); *Duluth PCS, Inc. and St. Joseph PCS, Inc.*, Order, 19 FCC Rcd 7137, 7141-42, paras. 8-9 (WTB/ASAD 2004) (rejecting petitioner’s claim that “circumstances are unique in that it provides service to rural areas and tribal lands with low telephone service penetration rates” and denying request for waiver of installment payment deadline). Likewise, Petitioners’ claims that they acted “diligently” in preparing SAL’s Auction 1002 application and that their interpretation of the rural service provider bidding credit rule to exclude foreign subscribers “was not unreasonable,” Petitioners Reply at 11-12, are not relevant to our determination here. Petitioners’ purported good faith is not a unique circumstance; nor does it suggest that SAL has no reasonable alternative other than a waiver. SAL’s application was deemed complete, and SAL was found to be qualified to bid in Auction 1002, which will begin on August 16, 2016. *See generally Upfront Payment Instructions*

(continued....)

providers are eligible for a bidding credit; the subscriber threshold is specifically designed to limit eligibility to only those rural providers with fewer than 250,000 subscribers. Undoubtedly, other providers, particularly those that serve more than 250,000 subscribers, have a similar list of rural deployments and accomplishments.⁷⁴ Consequently, Petitioners have not demonstrated a compelling reason for us to provide an exclusive advantage to them in this auction by granting a waiver.

20. We also fail to see how previously qualifying for other types of bidding credits or federal grants in certain circumstances renders the failure to obtain a different bidding credit, based on different criteria, inequitable or unduly burdensome. As discussed above, the Commission followed a similar approach for the rural service provider bidding credit as the small business bidding credit, ignoring the other contexts of federal assistance cited by Petitioners. Moreover, the tribal lands bidding credit that Petitioners and tribal commenters repeatedly refer to is not analogous to the rural service provider bidding credit. Most importantly, the tribal lands bidding credit has no eligibility requirements that would disqualify a provider with significant financial resources from seeking the credit; rather, the credit is aimed at encouraging service in tribal lands from all providers, whether big or small.⁷⁵ In any event, contradicting their claims of an undue burden from having to compete against other providers without a bidding credit, Petitioners acknowledge that they have successfully deployed service in rural areas without federal assistance.⁷⁶

21. We conclude, therefore, that Petitioners have not shown that a waiver is warranted under either prong of the Section 1.925(b)(3) waiver standard.⁷⁷

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for the Forward Auction (Auction 1002) of the Broadcast Television Spectrum Incentive Auction; Updated Appendix on Upfront Payment Amounts; Upfront Payments Due by July 1, 2016, Public Notice, DA 16-625, para. 18 (WTB June 8, 2016); *62 Applicants Qualified To Bid in the Forward Auction (Auction 1002) of the Broadcast Television Incentive Auction; Clock Phase Bidding To Begin on August 16, 2016*, Public Notice, DA 16-796, Attach. A (WTB July 15, 2016) (*Qualified Bidder Public Notice*).

⁷⁴ For example, N.E. Colorado Cellular, Inc., and Union Telephone Company state that they “like many other small carriers, are serving rural America in a similarly commendable fashion, often without the benefit of federal subsidies and without the benefit of access to the public markets.” See N.E. Colorado Comments at 5.

⁷⁵ See 47 CFR § 1.2110(f)(3); *Extending Wireless Telecommunications Services to Tribal Lands*, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 11794, 11800, para. 16 (2000) (“[W]e find that establishing bidding credits for carriers, *regardless of size*, who agree to extend coverage to tribal areas is in the public interest.”) (emphasis added).

⁷⁶ See Waiver Petition at 10 n.23.

⁷⁷ As noted above, SAL has been determined to be qualified to bid in Auction 1002 and thus will have access to the Auction System, which is designed to provide each bidder with real-time information about its total bid amount (referred to as the “commitment”) – both gross and net (i.e., inclusive of any claimed bidding credits). At this point in the forward auction process, the Auction System is not capable of reflecting modifications to the bidding credit shown for any applicant, and therefore, the Auction System will display for SAL its net commitment with the rural service provider bidding credit applied, as well as (gross) commitment. That display does not change the determination we make herein; nor should SAL interpret that to mean that it is in fact entitled to the rural service provider bidding credit. See also *Qualified Bidder Public Notice* at 1-2 n.2 (SAL claim for bidding credit subject to the outcome of these proceedings).

22. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309(j) and the authority delegated pursuant to Sections 0.131 and 0.331 of the Commission's rules, as amended, 47 CFR §§ 0.131(c), 0.331, the Petition for Waiver filed by Atlantic Tele-Network, Inc., and SAL Spectrum, LLC, and the requests for relief sought therein, are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jon Wilkins
Chief
Wireless Telecommunications Bureau