

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

In the Matter of )
Connect America Fund ) WC Docket No 10-90
Connect America Fund Phase II Auction ) AU Docket No. 17-182

ORDER

Adopted: June 25, 2018

Released: June 25, 2018

By the Chiefs, Wireline Competition Bureau and Wireless Telecommunications Bureau:

1. In this Order, the Wireline Competition Bureau and the Wireless Telecommunications Bureau (collectively, the Bureaus), in conjunction with the Rural Broadband Auctions Task Force, address petitions for waiver of the Commission’s Connect America Fund Phase II auction (Auction 903) short-form application requirements. Specifically, the Bureaus grant petitions from applicants requesting that the Commission accept late-filed FCC Form 477s as evidence of an applicant’s experience offering a voice and/or broadband service, and deny a petition from one applicant that has not filed FCC Form 477s for all three relevant filing periods. The Bureaus also deny a petition requesting that the Commission waive the requirement that applicants with fewer than two years of experience offering a voice, broadband, and/or electric transmission or distribution service submit three years of audited financial statements with their short-form applications.

I. BACKGROUND

2. To further the Commission’s progress toward closing the digital divide for all Americans, including those in rural areas of our country, Auction 903 will award up to \$1.98 billion over 10 years to service providers that commit to offer voice and broadband services to fixed locations in unserved high-cost areas. In the Phase II Auction Order, the Commission adopted a two-phased auction application process.1 In the first phase, entities seeking to participate in the auction must have filed a short-form application (FCC Form 183) by March 30, 2018 in which they provided specific information and certified, under penalty of perjury, their qualifications.2 The Commission reviewed these applications and determined whether the applicants are qualified to bid in the auction, which is scheduled to begin on July 24, 2018.3 In the second phase of the process, each winning bidder must file a more comprehensive long-form application (FCC Form 683), which the Commission will review to determine if a winning bidder should be authorized to receive support for its winning bids.4

3. In the Phase II Auction Order, the Commission adopted short-form application requirements for Auction 903 relating to an applicant’s technical and financial qualifications to participate in Auction

1 Connect America Fund et al., Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 5980, para. 92 (2016) (Phase II Auction Order).

2 See Connect America Fund Phase II Auction Scheduled for July 24, 2018; Notice and Filing Requirements and Other Procedures for Auction 903, Public Notice, 33 FCC Rcd 1428 (2018) (Auction 903 Procedures Public Notice)

3 Id., 220 Applicants Qualified to Bid in the Connect America Fund Phase II Auction; Bidding to Begin on July 24, 2018, Public Notice, DA 18-658 (WCB/WTB June 25, 2018) (Qualified Bidders Public Notice).

4 Phase II Auction Order, 31 FCC Rcd at 5987-99, paras. 113-41.

903.<sup>5</sup> Relevant here, the Commission requires an applicant that has certified that it has provided voice and/or broadband services for at least two years prior to the short-form application filing deadline, or that it is the wholly-owned subsidiary of such an entity, to also certify that it or its parent company has filed FCC Form 477 Local Telephone Competition and Broadband Reports (FCC Form 477) as required during that time period.<sup>6</sup> The applicant must identify the FCC Registration Number(s) (FRN) it (or its parent company) used to file its FCC Form 477 for the relevant filing periods—data as of June 30, 2017; data as of December 31, 2016; and data as of June 30, 2016.<sup>7</sup> As set out in the *Auction 903 Procedures Public Notice*, FCC Form 477 data for these periods on file as of February 5, 2018 are used to corroborate each applicant's certification that it has been providing voice and/or broadband service for at least two years.<sup>8</sup>

4. In the *Phase II Auction Order*, the Commission also adopted an alternative for applicants that do not have at least two years of experience operating a voice, broadband, and/or electric distribution or transmission network to become qualified to participate in the auction. Such applicants could instead submit (1) audited financial statements from the three most recent fiscal years and (2) a letter of interest from a qualified bank stating that the bank would provide a letter of credit to the applicant if the applicant becomes a winning bidder.<sup>9</sup>

5. Entities interested in participating in Auction 903 were invited to file short-form applications between March 19, 2018 and March 30, 2018.<sup>10</sup> Two hundred and seventy-seven applicants filed short-form applications.<sup>11</sup> A public notice announcing the status of the 277 short-form applications received for Auction 903 was released on May 14, 2018.<sup>12</sup> The Bureaus then allowed applicants that had their application deemed incomplete to address identified deficiencies in their applications between May 15, 2018 and June 5, 2018.<sup>13</sup>

6. *Petitions for Waiver*. Eleven applicants filed petitions for waiver of the Commission's decision to use data on file as of February 5, 2018 (collectively, FCC Form 477 petitions) to validate applicants' certification that they had been providing a voice and/or broadband service for at least two

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<sup>5</sup> *Id.* at 5982, para. 100.

<sup>6</sup> 47 CFR § 54.315(a)(7)(i)(A); *Phase II Auction Order*, 31 FCC Rcd at 5982, para. 100. Twice a year, in FCC Form 477: (1) all facilities-based providers of broadband connections to end users and facilities-based providers of terrestrial mobile wireless broadband must file broadband deployment and subscription data; (2) all incumbent or competitive local exchange carriers and providers of interconnected VoIP must file voice subscription data; and (3) all facilities-based mobile voice providers must file voice deployment and subscription data. 47 CFR §§ 1.7001, 1.7002; FCC, FCC Form 477: Local Telephone Competition and Broadband Reporting Instructions at 5-9, <http://transition.fcc.gov/form477/477inst.pdf>.

<sup>7</sup> *Auction 903 Procedures Public Notice*, 33 FCC Rcd at 1444, para. 42.

<sup>8</sup> *Id.*

<sup>9</sup> 47 CFR § 54.315(a)(7)(ii); *Phase II Auction Order*, 31 FCC Rcd at 5985, para. 106; *Auction 903 Procedure Public Notice*, 33 FCC Rcd at 1445-46, para. 45.

<sup>10</sup> *Auction 903 Procedures Public Notice*, 33 FCC Rcd at 1432-33, para. 10.

<sup>11</sup> *Connect America Fund Phase II Auction Status of Short-Form Applications to Participate in Auction 903; Corrections due June 5, 2018*, Public Notice, DA 18-484 (2018) (*Auction 903 Status Public Notice*).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

years.<sup>14</sup> In many cases, these applicants discovered through the application process that they had not filed timely FCC Form 477s for one or more of the relevant filing periods and then all but one—Net Vision Communications, LLC (Net Vision)—submitted FCC Form 477s for all the relevant filing periods after the Commission’s February 5 deadline. Accordingly, these applicants request that the Commission accept their late-filed FCC Form 477s as evidence of their experience providing voice and/or broadband services.

7. Additionally, Sonus Technologies, Inc. (Sonus) seeks waiver of the requirement that applicants with fewer than two years of experience providing a voice, broadband, and/or electric transmission or distribution service submit three years of audited financial statements.<sup>15</sup> Sonus submitted three years of unaudited financial statements and tax returns with its application and committed to providing audited financial statements upon being deemed qualified to bid in the auction.

## II. DISCUSSION

8. Generally, the Commission’s rules may be waived for good cause shown.<sup>16</sup> Waiver of the Commission’s rules is appropriate only if both: (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest.<sup>17</sup> We find good cause to grant 10 of the 11 FCC Form 477 petitions, but deny the petition filed by Net Vision because the applicant still has not filed a FCC Form 477 for one of the relevant filing periods. We also deny Sonus’s petition for waiver of the requirement that an applicant with fewer than two years of experience submit three years of audited financial statements.

9. *FCC Form 477 Petitions.* We find good cause to grant the FCC Form 477 petitions filed by applicants that have since filed FCC Form 477s for all three of the relevant filing periods for several reasons. First, we find that special circumstances warrant deviating from the requirement that FCC Form 477 data be on file with the Commission as of February 5, 2018. The Commission adopted this cut-off date for Auction 903 applications so that the application system would be able to verify that the FCC Form 477 FRNs that were provided by the applicant were in fact used to file FCC Form 477 data for the relevant filing periods. However, we were able to verify that each of these applicants has since filed, and certified to the accuracy of, the required FCC Form 477 data demonstrating that the applicant has been providing a broadband service for at least two years. We conclude that because we were able to use alternative means to accomplish the Commission’s objective of verifying that the applicant has at least two years of experience based on its FCC Form 477 data, this constitutes a special circumstance that warrants deviating from the February 5, 2018 cut-off date.

10. Second, we conclude that it will serve the public interest to accept the late-filed FCC Form 477s to verify each applicant’s experience.<sup>18</sup> The Commission noted when adopting the short-form application requirements that it was balancing maximizing participation in the auction with implementing

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<sup>14</sup> Waiver petitions were filed by: Workable Programs and Systems, Inc.; Redzone Wireless, LLC; Emerald Cable Co LLC; Hankins Information Technology; Net Vision Communications LLC; Good Connections, LLC; Red Spectrum Communications LLC; 360 Communications, Inc.; Pueblo of Laguna Utility Authority, Inc.; Northern Arapaho Tribal Industries, and Skyrunner, Inc. Each of these applicants timely filed its short-form application on or before the due date of March 30, 2018.

<sup>15</sup> Waiver Petition filed by Sonus Technologies, Inc. Atlantic Fiber Networks, LLC also filed a petition for waiver of this requirement, but withdrew the petition after it submitted three years of audited financial statements during the resubmission window.

<sup>16</sup> 47 CFR § 1.3.

<sup>17</sup> See *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969), cert. denied, 93 S.Ct. 461 (1972)).

<sup>18</sup> See *Auction 903 Procedures Public Notice*, 33 FCC Rcd at 1486, para. 167 (finding good cause to provide a limited waiver of the red light rule for any applicant seeking to participate in Auction 903 because robust participation is critical to success of the Phase II auction).

appropriate safeguards to protect consumers in rural and high-cost areas by ensuring that potential bidders are financially and technically qualified to participate in the auction.<sup>19</sup> Because these applicants have demonstrated that they have at least two years of experience by filing FCC Form 477s—even after the February 5 deadline—we have added assurance that these applicants have the requisite technical qualifications to participate in the auction should they meet all the other application requirements.<sup>20</sup> Moreover, based on our conclusion that these applicants have demonstrated the requisite experience for participation in Auction 903, we anticipate that granting this waiver will increase the likelihood of greater participation by verified experienced applicants in the auction, thereby enhancing competition for our finite Connect America Fund Phase II budget.

11. We acknowledge that these applicants seeking waivers violated the Commission’s rules by failing to file their FCC Form 477s by the applicable deadlines. It is highly important that all entities subject to these requirements file their FCC Form 477s on time because the Commission relies on these data to inform its policymaking.<sup>21</sup> Nevertheless, in the context of Auction 903 short-form applications, the FCC Form 477s had a more limited utility—i.e., to provide evidence of an applicant’s experience—and we were able to overcome the absence of such data with data filed after the February 5 deadline. Our decision to permit such applicants to participate in the auction if they are otherwise deemed qualified does not in any way serve as a waiver of our Form 477 filing deadlines and does not preclude the Commission from initiating enforcement actions against parties that violate its FCC Form 477 filing requirements. Moreover, we remind applicants that they will be subject to reporting deadlines if they are authorized to receive Auction 903 support and non-compliance measures will be imposed if such filing deadlines are not met.<sup>22</sup>

12. Finally, our decision to grant the applicants’ petitions for waiver does not necessarily mean that these applicants are qualified to participate in Auction 903. Our final decision about whether an applicant is qualified to bid in the auction will be based on each applicant’s entire application and is announced in the *Qualified Bidders Public Notice* released today.<sup>23</sup>

13. We do, however, deny the petition for waiver filed by Net Vision. Net Vision still has not filed a FCC Form 477 for the data as of June 30, 2016 filing. Thus, we are not able to accomplish the Commission’s objective of verifying that, on a timely basis, the applicant has at least two years of experience based on its FCC Form 477 data. Net Vision also did not provide any other justification that would enable us to find good cause for granting its waiver.

14. *Three-Years Audited Financial Statements.* We decline to waive the requirement that an applicant with fewer than two years of experience submit three years of audited financial statements with its application. First, Sonus did not demonstrate that special circumstances warrant deviating from this requirement. Sonus did not provide a detailed explanation in its petition regarding why it was unable to submit audited financial statements with its application. Instead, Sonus merely states that it “could not

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<sup>19</sup> *Phase II Auction Order*, 31 FCC Rcd at 5986, para. 109.

<sup>20</sup> Because, with these waivers, each of these applicants has sufficiently demonstrated that it has been providing a broadband service for at least two years, we dismiss as moot alternative requests for waiver of requirements that do not apply to such applicants.

A determination that an applicant is a qualified bidder is not determinative of an applicant’s qualifications to receive Connect America Fund Phase II support. Under the Commission’s two-phased auction application process, after the close of the auction, a qualified bidder that wins one or more bids must submit a long-form application and meet various other requirements that are fully explained in the *Auction 903 Procedures Public Notice*, 33 FCC Rcd at 1512-20, paras. 289-313.

<sup>21</sup> See, e.g., *Phase II Auction Order*, 31 FCC Rcd at 5969, para. 57 (deciding to rely on FCC Form 477 data to determine which areas are eligible for Auction 903).

<sup>22</sup> See, e.g., 47 CFR §§ 54.313, 54.316.

<sup>23</sup> See *Qualified Bidders Public Notice*.

complete the audit process in the allocated time provided for updated responses” and would “commit” to submitting audited financial statements upon its “acceptance to the” auction.<sup>24</sup> In contrast to our decision above with respect to late-filed FCC Form 477 data, there are no other means available to accomplish the Commission’s objective of having applicants that lack two years of experience demonstrate their financial qualifications through the use of *audited* financial information.

15. All Auction 903 participants are required to submit audited financial statements prior to being authorized to receive support. When the Commission adopted this rule in May 2016, it emphasized the importance of being able to review financial statements that had been audited by an independent certified public accountant.<sup>25</sup> The Commission noted that auditors “develop a detailed understanding of the internal controls environment and conduct more in-depth testing of individual transactions posted to the general ledger.”<sup>26</sup> The Commission gave experienced applicants that are not audited in the ordinary course of business the option of submitting one year of *unaudited* financial statements with their short-form applications if they certified they would provide *audited* financial statements within 180 days of being announced as winning bidders.<sup>27</sup> However, the Commission specifically declined to extend this option to applicants with fewer than two years of experience due to their lack of operating history and instead required that such applicants submit audited financial statements with the short-form application.<sup>28</sup>

16. Our conclusion that Sonus has not demonstrated special circumstances is sufficient grounds for denying this petition.<sup>29</sup> Nevertheless, we also are not persuaded that granting this waiver petition would serve the public interest. For the reasons explained above, we conclude that it would undermine the Commission’s role as steward of the public funding to permit an inexperienced applicant to bid in the auction when such an applicant had not provided audited financial statements with its short-form application, thus denying the Bureaus a sufficient opportunity to accurately assess the applicant’s financial qualifications.<sup>30</sup>

### III. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 254, and sections 0.91, 0.131, 0.291, 0.331, and 1.3 of the Commission’s rules, 47 CFR §§ 0.91, 0.131, 0.291, 0.331, 1.3, that this Order IS ADOPTED.

18. IT IS FURTHER ORDERED that the petitions for waiver filed by Workable Programs and Systems, Inc.; Redzone Wireless, LLC; Emerald Cable Co LLC; Hankins Information Technology; Good Connections, LLC; Red Spectrum Communications LLC; 360 Communications, Inc.; Pueblo of Laguna Utility Authority, Inc.; Northern Arapaho Tribal Industries, and Skyrunner, Inc. ARE GRANTED as described herein.

19. IT IS FURTHER ORDERED that the petitions for waiver filed by Net Vision Communications, LLC and Sonus Technologies, Inc. ARE DENIED as described herein.

20. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission’s rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

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<sup>24</sup> Sonus Technology, Inc. Waiver Petition.

<sup>25</sup> *Phase II Auction Order*, 31 FCC Rcd at 5983, para. 101.

<sup>26</sup> *Id.*

<sup>27</sup> 47 CFR 54.315(a)(7)(i); *Phase II Auction Order*, 31 FCC Rcd at 5983-84, para. 102.

<sup>28</sup> *Phase II Auction Order*, 31 FCC Rcd at 5985, para. 106 n.210.

<sup>29</sup> *See Northeast Cellular*, 897 F.2d at 1166.

<sup>30</sup> *Phase II Auction Order*, 31 FCC Rcd at 5986, para. 109 (acknowledging that not all entities that are interested in participating in the auction will be able to meet the short-form application requirements).

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