

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

In the Matter of)	
)	
Connect America Fund)	AU Docket No. 17-182
)	
Petition of Hawaiian Telcom, Inc. and Cincinnati Bell Inc. for Expedited Waiver of Section 1.21001(d)(4) of the Commission’s Rules)	WC Docket No. 10-90
)	
Request of Horizon Telcom, Inc. for Waiver of Section 1.21001(d)(4) of the Commission’s Rules)	

ORDER

Adopted: June 25, 2018

Released: June 25, 2018

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

I. INTRODUCTION

1. In this Order, we grant separate petitions of Hawaiian Telcom, Inc. (Hawaiian Telcom) and Horizon Telcom, Inc. (Horizon) (collectively, petitioners) for waiver of Section 1.21001(d)(4) of the Commission’s rules to allow each petitioner to make a major modification to its Auction 903 short-form application (FCC Form 183) upon consummation of their respective Bureau-approved transfers of control. For the reasons discussed below, we will permit each petitioner to amend its FCC Form 183 to reflect the approved change of control without disqualifying them from participation in Auction 903.

II. BACKGROUND

2. Auction 903, the Connect America Fund Phase II auction, is a reverse auction that will award up to \$198 million annually for 10 years to service providers that commit to offer voice and broadband services to fixed locations in unserved high-cost areas.¹ On February 1, 2018, the Commission released a public notice establishing application and bidding procedures for Auction 903, and announcing that bidding would begin on July 24, 2018.² Among other things, the *Auction 903 Procedures Public Notice* required entities seeking to participate in Auction 903 to file FCC Form 183 by the initial deadline of March 30, 2018.³

3. Pursuant to the Commission’s rules and the Auction 903 procedures, an applicant is permitted to make only minor changes to its FCC Form 183 (e.g., deletion or addition of authorized bidders, correction of typographical errors and supplying non-material information that had been inadvertently omitted, or making certain other administrative changes) after the initial FCC Form 183

¹ See *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17692-94, 17695, paras. 77-83, 86 (2011), *aff’d sub nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

² *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, 1432, para. 8 (2018) (*Auction 903 Procedures Public Notice*).

³ *Id.* at 1433, para. 10. FCC Form 183 requires applicants to provide specific information and certifications, under penalty of perjury, regarding their qualifications. *Id.* at 1438, para. 20.

filing deadline.⁴ After the auction application deadline, major changes described in Section 1.21001(d)(4), such as changes in ownership that result in a change of control, will disqualify the applicant from participation in the competitive bidding, absent waiver.⁵

4. Prior to the Commission's release of the *Auction 903 Procedures Public Notice*, each petitioner sought Commission consent to undertake a transfer of control. Specifically, on August 11, 2017, Hawaiian Telcom Holdco, Inc. (Holdco) and Cincinnati Bell, Inc. (Cincinnati Bell) filed a Section 214 domestic transfer application requesting consent to transfer control of Holdco and its subsidiaries, including petitioner Hawaiian Telcom, to Cincinnati Bell.⁶ Similarly, on January 26, 2018, Horizon and Horizon Acquisition Parent, LLC (Horizon Parent) filed an application requesting consent to transfer control of Horizon and two subsidiaries to Horizon Parent.⁷

5. These requests remained pending before the Commission at the March 30, 2018 auction application deadline. Hawaiian Telcom and Horizon separately filed short-form applications to participate in Auction 903.⁸ In a subsequent amendment, Hawaiian Telcom disclosed Cincinnati Bell as a future disclosable interest holder and provided additional financial information related to the transfer of control.⁹ Concurrently with that amendment, Hawaiian Telcom filed its petition for waiver, in which it certifies that Cincinnati Bell will be bound by Hawaiian Telcom's actions in the auction, and that all representations and certifications made in its FCC Form 183 will remain effective and enforceable notwithstanding the transaction.¹⁰ Likewise, Horizon amended its short-form application to submit its request for waiver and disclose the real parties in interest in the post-merger applicant, Horizon Parent,

⁴ *Id.* at 1487, para. 171; *see* 47 CFR § 1.21001(d)(5) (minor modification rule).

⁵ *Auction 903 Procedures Public Notice*, 33 FCC Rcd at 1487, para. 171; 47 CFR § 1.21001(d)(4) (major modification rule); *see also* *Auction 903 Procedures Public Notice*, 33 FCC Rcd at 1488, para. 172 (discussing duty to maintain accuracy and completeness of FCC Form 183).

⁶ Petition of Hawaiian Telcom, Inc. and Cincinnati Bell Inc. for Expedited Waiver of Section 1.21001(d)(4) and 54.315(b)(6)(iv) of the Commission's rules, AU Docket No. 17-182, WC Docket Nos. 10-90, 17-207, at 3 & n.2 (filed June 5, 2018) (Hawaiian Telcom Petition); *see* 47 U.S.C. § 214.

⁷ FCC Form 183 of Horizon Telcom, Inc., FCC File No. 0008152806, Request for Waiver, at 1 (filed June 5, 2018) (Horizon Petition). Horizon Parent is controlled by Novacap TMT V, L.P. and Novacap International TMT V, L.P. (collectively, Novacap), a Canadian private equity group. *Id.* at 6 & n.15, 14. On January 31, 2018, Horizon filed a Section 214 international transfer application seeking Commission consent to transfer global resale authorization held by Horizon subsidiary Chillicothe Telephone Company (CTC) to Horizon Parent (international transfer application). *Id.* at 1-2. Contemporaneously, Horizon filed an application to transfer control of wireless licenses held by CTC to Horizon Parent (wireless transfer application). *Id.*

⁸ FCC Form 183 of Hawaiian Telcom, Inc., FCC File No. 0008154732 (filed Mar. 30, 2018); FCC Form 183 of Horizon Telcom, Inc., FCC File No. 0008152806 (filed Mar. 30, 2018); *see also* *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, Attach. B at 2, 4 (WCB/WTB May 14, 2018) (*Auction 903 Application Status Public Notice*). In the *Auction 903 Application Status Public Notice*, the Bureaus announced that applicants whose applications were deemed initially incomplete—including Hawaiian Telcom and Horizon—would be allowed to correct identified deficiencies in their applications between May 15, 2018 and June 5, 2018. *Id.* at 2, para. 6; *see id.*, Attach. B at 2, 4. Cincinnati Bell also is an applicant to participate in Auction 903. FCC Form 183 of Cincinnati Bell Inc., FCC File No. 0008154318 (filed Mar. 30, 2018). Separate from the rule governing application amendments, the Commission's rule prohibiting certain auction-related communications between applicants, including between Cincinnati Bell and Hawaiian Telcom and its controlling interest holders, has been applicable since the short-form application deadline. However, because both applicants disclosed a mutual joint bidding agreement in their respective short-form auction applications, communications between them are excepted from the prohibition. *See* 47 CFR § 1.21002(b).

⁹ FCC Form 183 of Hawaiian Telcom, Inc., FCC File No. 0008154732 (amended June 5, 2018); *see* Hawaiian Telcom Petition at 6-7; 47 CFR § 1.21001(b)(1).

¹⁰ Hawaiian Telcom Petition at 7.

which is owned by Novacap TMT V, L.P. and Novacap International TMT V, L.P., and provided financial information for the post-transfer entity.¹¹ Horizon asserts that the pending transaction does not affect its qualifications to bid in Auction 903, and that the transfer of indirect control to Novacap through its ownership of Horizon Parent will not impact the day-to-day management of Horizon or its operating subsidiary, CTC.¹²

6. On May 29, 2018, the Wireline Competition Bureau (Bureau) approved Horizon's Section 214 domestic transfer application.¹³ On June 19, 2018, the Bureau approved the Holdco-Cincinnati Bell transfer application.¹⁴

III. DISCUSSION

7. The Commission may waive its rules and requirements where there is "good cause shown" to do so.¹⁵ Good cause, in turn, may be found "where particular facts would make strict compliance inconsistent with the public interest."¹⁶ In making this determination, the Commission may "take into account considerations of hardship, equity, or more effective implementation of overall policy."¹⁷ A waiver is therefore "appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."¹⁸ To make such a public interest determination, the waiver cannot undermine the purposes of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule.¹⁹

8. We conclude that there is good cause for granting the requested waivers. First, we find that special circumstances warrant deviating here from the rule prohibiting major modifications to an applicant's FCC Form 183 after the short-form deadline. Hawaiian Telcom and Horizon each filed their respective Section 214 transfer applications before the Commission announced the short-form deadline in the *Auction 903 Procedures Public Notice*, and therefore petitioners were not aware of the short-form

¹¹ FCC Form 183 of Horizon Telcom, Inc., FCC File No. 0008152806 (amended June 5, 2018).

¹² Horizon Petition at 5-6.

¹³ *Id.* at 3; see *Domestic Section 214 Application Granted for the Transfer of Control of Horizon Telcom, Inc. to Horizon Acquisition Parent, LLC*, Public Notice, DA 18-558 (WCB May 29, 2018). The International Bureau and the Wireless Telecommunications Bureau approved Horizon's international transfer application and wireless transfer application on May 25, 2018 and May 31, 2018, respectively. Horizon Petition at 3.

¹⁴ *Applications Granted for the Transfer of Control of Hawaiian Telcom Holdco, Inc. to Cincinnati Bell Inc.*, Public Notice, DA 18-558 (WCB June 19, 2018).

¹⁵ 47 CFR § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.").

¹⁶ *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁷ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

¹⁸ *Ne. Cellular Tel. Co.*, 897 F.2d at 1166.

¹⁹ See, e.g., *Request for Permanent Renewal of, and Changes to Conditions on, Waiver Granted to SafeView, Inc.*, Order, 26 FCC Rcd 10250, 10252 (OET 2011) (citing *Ne. Cellular Tel. Co.*, 897 F.2d at 1166); see also *WAIT Radio*, 418 F.2d at 1155, 1157. The waiver standard applied under Section 1.3 is substantially the same as the waiver standard applied under Section 1.925 in the context of wireless radio services licenses. See *Delta Radio, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16889, 16891, para. 7 & n.19 (2003) (citing *Bellsouth Corp. v. FCC*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999)); 47 CFR § 1.925. Section 1.925(b)(3) provides that:

The Commission may grant a request for waiver if it is shown that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

47 CFR § 1.925(b)(3).

deadline at the time they filed for approval. In addition, each of the petitioners has made the required application disclosures regarding the parties to their respective transactions and has been found qualified to bid.²⁰ Based on our review of the petitioners' application disclosures, we conclude that they will likewise remain qualified following the proposed consummation of their respective transactions. Although the Bureau approved the transfers of control after the short-form deadline and prior to the announcement of qualified bidders for Auction 903, petitioners would now be disqualified from bidding if they consummate the transactions, absent waiver.

9. Further, we find that deviation from the rule in these circumstances is in the public interest because granting the requested waivers will not undermine the purposes of the rule prohibiting major modifications and there is a stronger public interest benefit in granting the waivers than in applying the rule. As the Commission has noted, the prohibition on major modifications promotes a number of related objectives, including, but not limited to, assuring that: an auction applicant's ownership structure, financial condition, and real parties-in-interest are fully disclosed and can be assessed prior to the auction;²¹ the representations and certifications in the application remain effective and enforceable while the application is pending;²² the pre-auction process is transparent; and the Commission, auction participants, and other applicants have consistent and transparent information about the identity of other applicants, which enhances auction competition by leveling the informational playing field.²³ Granting the requested waivers in these circumstances will not undermine Section 1.21001(d)(4)'s objectives because petitioners disclosed their future real parties-in-interest prior to the short-form deadline in their Section 214 filings and included relevant information on their post-transaction ownership in their short-form applications. Also, the parties fully disclosed their proposed post-consummation ownership structures and confirmed the continuing effectiveness of the representations made in their auction applications. Thus, we conclude that the rule's particular purposes of safeguarding the integrity of the pre-auction review and qualification process do not require strict application of the major change prohibition in these special circumstances, and that deviation from the general rule is warranted.

10. These waivers offer potential public interest benefits that would not have been realized through strict application of the rule. The purpose of Auction 903—identifying the set of qualified applicants that are willing and able to compete to provide service in the eligible areas in exchange for the lowest possible public subsidy—will be most effectively met by encouraging participation and avoiding unnecessary disqualification.²⁴ Accordingly, grant of this waiver would serve the public interest by allowing service providers meeting this narrow set of qualifications to compete to provide service to unserved high-cost areas.

11. We are thus persuaded that the petitioners, which have demonstrated their qualifications

²⁰ *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*).

²¹ *Auction 903 Procedures Public Notice*, 33 FCC Rcd at 1487, para. 171 n.353.

²² *See Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, Public Notice, 30 FCC Rcd 10794, 10803, para. 24 (WTB 2015) (*Prohibited Communications Guidance Public Notice*).

²³ *Auction of FM Translator Construction Permits Scheduled for June 21, 2018; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and other Procedures for Auction 83*, Public Notice, 33 FCC Rcd 2292, 2297, para. 8 (WTB/MB 2018); *see also Prohibited Communications Guidance Public Notice*, 30 FCC Rcd at 10803, para. 24.

²⁴ This is consistent with the waiver of the prohibition on transfers of control in the reverse auction portion of the broadcast incentive auction. That waiver was based, in part, on the fact that eligibility to participate in the reverse auction was limited, and that the Commission had prioritized participation to promote the public interest goals of the incentive auction. *See Prohibited Communications Guidance Public Notice*, 30 FCC Rcd at 10803, paras. 23-24; *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6570, para. 2 (2014) (modified by Erratum (rel. June 3, 2014)).

for bidding, should not be excluded from participating in Auction 903 based solely on the consummation of their pending mergers.

12. Thus, we conclude that there is good cause for granting the requested waivers.²⁵ These waivers are conditioned on each petitioner consummating its approved transaction prior to the start of bidding in Auction 903.

IV. ORDERING CLAUSES

13. 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.

14. IT IS FURTHER ORDERED that the Petitions for Waiver filed by Hawaiian Telcom, Inc. and Horizon Telcom, Inc. are GRANTED as described herein.

15. 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.

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith
Chief
Wireline Competition Bureau

Donald K. Stockdale
Chief
Wireless Telecommunications Bureau

²⁵ Each petitioner shall notify the Commission within 30 days after the effective date of the transfer of control. *See* 47 CFR § 1.65. Pursuant to Section 1.65, each applicant has a continuing obligation to maintain the accuracy and completeness of information furnished in a pending application, *id.*, including a pending application to participate in Auction 903. *Auction 903 Procedures Public Notice*, 33 FCC Rcd at 1488, para. 172; *see also id.* at 1488-89, paras. 173-79 (describing procedures for modifying an applicant's FCC Form 183). For purposes of this section, an applicant's FCC Form 183 and associated attachments will remain pending until the release of a public notice announcing the close of Auction 903. *Id.* at 1488, para. 172 n.355.