

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

In the Matter of)	
)	
TexNet 4G, LLC)	WT Docket No. 10-208
)	
Request for Waiver of Section 1.21004 Mobility)	
Fund Phase I Auction Default Payment Rule)	

ORDER

Adopted: August 21, 2018

Released: August 21, 2018

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

I. INTRODUCTION

1. In this Order, we deny TexNet 4G, LLC’s (“TexNet”) request that we waive Section 1.21004 of the Commission’s rules to relieve it of its payment obligations arising out of its default on winning bids placed in Auction 901 for Mobility Fund Phase I support. We also dismiss as moot TexNet’s request for a stay of enforcement of this auction default payment rule pending resolution of its waiver request.

II. BACKGROUND

2. *Mobility Fund Phase I.* 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 are based on principles that include commitments to fiscal responsibility and accountability, and the use of market-based mechanisms, such as competitive bidding, to provide more 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 for 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 goal for Mobility Fund Phase I is to extend the availability of mobile voice and broadband service on networks that provide third generation (often called “advanced” or “3G”) or better performance and to accelerate the deployment of fourth-generation (“4G”) wireless networks in areas where it is cost effective to do so with one-time support.⁵

3. *Award of Support Through Reverse Auction.* The Commission decided that Phase I funding would be awarded through a reverse auction mechanism.⁶ To maximize coverage in eligible

¹ *Connect America Fund et al.*; Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17733, paras. 299-300 (2011) (*USF/ICC Transformation Order*).

² *Id.* at 17667, para. 1.

³ *Id.* at 17773, paras. 299-300.

⁴ *Id.* at 17773, para. 299, 18154-58, Appendix A (codified at 47 CFR §§ 54.1001-54.1010, 1.21000-1.21004).

⁵ *Id.* at 17781, para. 322.

⁶ *USF/ICC Transformation Order*, 26 FCC Rcd at 17781, 17783, paras. 322, 329.

unserved areas within the established budget of \$300 million, the *USF/ICC Transformation Order* provided that a reverse auction would be used to identify those areas where additional investment can make as large a difference as possible in a transparent, simple, speedy, and effective way and award support to no more than one carrier per area.⁷

4. *Public Interest Obligations of Winners of Mobility Fund Phase I Support.* Mobile service carriers receiving Phase I support are required to satisfy specified public interest obligations in exchange for the support they receive.⁸ Specifically, receipt of Mobility Fund Phase I support is conditioned upon the recipient providing service over a network that achieves particular data rates.⁹ Recipients had to commit to provide coverage for at least seventy-five percent (75%) or more of the designated road miles within the relevant area.¹⁰ Those proposing to provide 3G service would be required to provide that minimum level of coverage within two years of being authorized to receive support,¹¹ and those electing to provide supported services over 4G networks would have three years to do so.¹²

5. *Auction Default Payment Requirement.* Section 1.21004 of the Commission's rules imposes an auction default payment obligation on any winning bidder that defaults on its bids.¹³ Section 1.21004 provides that each Mobility Fund winning bidder must submit a timely post-auction support application for an award of funds.¹⁴ Failure to submit an application or to obtain authorization for support is a default on the bidder's winning bids and will subject the applicant to liability for an auction default payment.¹⁵ In the *USF/ICC Transformation Order*, the Commission adopted this payment obligation as a measure to ensure that auction participants fulfill their obligations and do not impose significant costs on the Commission and higher support costs on the Universal Service Fund (USF), as well as to deter failures that would undermine the stability and predictability of the auction process.¹⁶ The *USF/ICC Transformation Order* provided that each bidder would be required to agree to make such a payment in the event of default as a condition for participating in bidding for Mobility Fund Phase I support.¹⁷

6. *Auction 901 Procedures.* Having established a reverse auction framework in the *USF/ICC Transformation Order*, the Commission delegated to the Wireless Telecommunications Bureau and the Wireline Competition Bureau (together, the "Bureaus") authority to implement this program.¹⁸ The Commission's initial reverse auction of Mobility Fund Phase I support was designated Auction 901,

⁷ *Id.* at 17781-83, paras. 322-28. We refer to areas without 3G or better services and the road miles within them as "unserved."

⁸ *USF/ICC Transformation Order*, 26 FCC Rcd at 17791, para. 360.

⁹ *Id.*; see 47 CFR §§ 54.1005(b)(2)(v), 54.1006(b).

¹⁰ 47 CFR § 54.1006(a), (b).

¹¹ 47 CFR § 54.1006(a). As was required of all potential auction participants, TexNet was required to certify on its pre-auction short-form application that it was financially and technically capable of providing 3G or better service within the specified timeframe. 47 CFR § 54.1005(b)(2)(ii).

¹² *USF/ICC Transformation Order*, 26 FCC Rcd at 17792, para. 365. Support recipients that, like TexNet, elected to provide 4G service were required to offer mobile transmissions to and from the network to handheld mobile devices at outdoor speeds of at least 768 kbps downstream and 200 kbps upstream. *Id.* at 17792, para. 362.

¹³ 47 CFR § 1.21004; *USF/ICC Transformation Order*, 26 FCC Rcd at 17813, para. 458.

¹⁴ 47 CFR § 1.21004(a).

¹⁵ *Id.*

¹⁶ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17813, paras. 459-60.

¹⁷ *Id.* at 17814, para. 460; 47 CFR § 1.21001(b)(7); see also 47 CFR § 1.21004.

¹⁸ *USF/ICC Transformation Order*, 26 FCC Rcd at 17783, para. 329.

and the Bureaus set out the procedures for Auction 901 in the *Auction 901 Procedures Public Notice*.¹⁹ The Bureaus urged all prospective bidders to familiarize themselves with the Commission's rules on universal service, including those governing the Mobility Fund.²⁰ The *Auction 901 Procedures Public Notice* cautioned that each applicant was responsible for performing its due diligence research and analysis before participating in the auction.²¹ That public notice explicitly warned each applicant to assure itself that, should it be a winner of support, it would be able to build and operate facilities in accordance with all Mobility Fund obligations.²²

7. For Auction 901, an auction default payment amount was set at five percent of the total defaulted bid.²³ The *Auction 901 Procedures Public Notice* stated that liability for the auction default payment would be imposed regardless of the intentions or fault of any specific defaulting bidder.²⁴

8. *Auction 901 Results.* Bidding in Auction 901 took place on September 27, 2012.²⁵ 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.²⁶ TexNet was the winning bidder for eight bids in Texas covering 3,520.58 road miles with \$5,161,170.28 in assigned Mobility Fund support.²⁷ Each winning bidder, including TexNet, was required to submit an FCC Form 680, the post-auction long-form application, by November 5, 2012.²⁸

9. *TexNet's Request for Waiver.* TexNet submitted its required long-form application on time but with deficiencies, and for over a year thereafter interacted with Commission staff to cure deficiencies in its application.²⁹ Although TexNet had certified in both its short- and long-form applications that it would be able to meet the Mobility Fund Phase I performance requirements,³⁰ on January 24, 2014, TexNet notified the Commission that it did not intend to complete its application for any of its winning bids because it had determined that it would be "unable to provide the service required

¹⁹ For more background on Auction 901 and the procedures under which it was conducted, see *Mobility Fund Phase I Auction Scheduled for Sept. 27, 2012 Notice & Filing Requirements & Other Procedures for Auction 901*, 27 FCC Rcd 4725 (WTB/WCB 2012) (*Auction 901 Procedures Public Notice*).

²⁰ *Id.* at 4740, para. 42.

²¹ *Id.* at 4748-49, paras. 71-77.

²² *Id.*

²³ *Id.* at 4776-77, paras. 184-88. See also *Mobility Fund Phase I Auction Scheduled for September 27, 2012; Comment Sought on Competitive Bidding Procedures for Auction 901 and Certain Program Requirements*, Public Notice, 27 FCC Rcd 530, 545-46 paras. 60-62 (WTB/WCB 2012).

²⁴ *Auction 901 Procedures Public Notice*, 27 FCC Rcd at 4777, para. 187.

²⁵ *Mobility Fund Phase I Auction Closes; Winning Bidders Announced for Auction 901; FCC Form 680 Due November 1, 2012*, Public Notice, 27 FCC Rcd 12031, 12032, para. 1 (WTB/WCB 2012) (*Auction 901 Closing Public Notice*).

²⁶ *Id.*

²⁷ *Auction 901 Closing Public Notice*, Attachment A.

²⁸ 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*, Public Notice, 27 FCC Rcd 13424, 13424, para. 1 (WTB/WCB 2012).

²⁹ TexNet 4G, LLC, File No. 005478544 (filed Nov. 5, 2012) (TexNet Long-Form Application): T48013960500 (Atascosa); T48013960600 (Atascosa); T48127950200 (Dimmit); T48127950400 (Dimmit); T48163950100 (Frio); T48283950300 (La Salle); T48311950100 (McMullen); T48479001710 (Webb).

³⁰ TexNet 4G, LLC Short-Form Application (filed July 11, 2012); TexNet Long-Form Application.

of award recipients.”³¹ TexNet also concurrently filed its Request for Waiver of section 1.21004, the auction default payment rule, and a Request for Stay of enforcement of the auction default payment rule pending resolution of its Request for Waiver.³²

10. TexNet seeks waiver of the auction default payment obligation based on what it characterizes as special circumstances beyond its control.³³ Specifically, TexNet asserts that the handset equipment that it had planned to use would not, in its estimation, be commercially available within the three year period provided for Mobility Fund awardees to construct a 4G network.³⁴ TexNet had planned to construct an all Internet Protocol, multi-cell 700 MHz LTE wireless data network in the southern Texas area.³⁵ TexNet notes that, while its plans had assumed that equipment capable of operating on the 700 MHz band would have been commercially available within the three-year construction period, “the market for 700 MHz handsets has been slow to develop and, to the extent equipment is available, it is expensive due to lack of economies of scale.”³⁶ TexNet suggests that issues of equipment interoperability in the 700 MHz band had slowed equipment development and that, even though a voluntary industry solution had been achieved to address those issues, TexNet would still need another 15 months after obtaining the equipment to construct a 4G network and complete testing.³⁷ TexNet would thus be subject to “severe time constraints” and would only be able to begin network deployment around the time that the three-year construction period would be coming to its end.³⁸ TexNet argues that the uncertainties about when this equipment would become available constitute “special circumstances” beyond its control that justify waiver of the rule.³⁹

III. DISCUSSION

11. The Commission may waive its rules and requirements “for good cause shown.”⁴⁰ A waiver is appropriate only if “special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”⁴¹ We may find that a rule waiver may serve the public interest where the waiver would not conflict with the policy underlying the rule.⁴²

12. We disagree that the commercial unavailability of interoperable handsets for use in the

³¹ Letter from Russell H. Fox, Counsel for TexNet 4G, LLC, to Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, FCC (Jan. 24, 2014).

³² TexNet 4G, LLC Request for Waiver (filed Jan. 24, 2014) (Request for Waiver); TexNet 4G, LLC Request for Stay (filed Jan. 24, 2014) (Request for Stay).

³³ Request for Waiver at 4-5, 8-9.

³⁴ Request for Waiver at 4-8.

³⁵ *Id.* at 2-3.

³⁶ *Id.* at 6.

³⁷ Request for Waiver at 6-7, citing *Promoting Interoperability in the 700 MHz Commercial Spectrum; Requests for Waiver and Extension of Lower 700 MHz Band Interim Construction Benchmark Deadlines*, Report and Order and Order of Proposed Modification, 28 FCC Rcd 15122 (2013) (*700 MHz Interoperability Order*).

³⁸ Request for Waiver at 7.

³⁹ *Id.* at 4-8.

⁴⁰ 47 CFR §§ 1.3, 0.131(a).

⁴¹ See, e.g., *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁴² See *WAIT Radio v. FCC*, 418 F.2d 1153, 1155, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 93 S.Ct. 461 (1972) (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).

lower 700 MHz band is a special circumstance that was outside TexNet's control, as it contends.⁴³ The Commission has consistently found that a rule waiver is not warranted where inability to comply with a Commission rule is attributable to a private party's independent business judgment.⁴⁴ We do not waive our rules so that applicants can escape the consequences of business decisions made of their own volition.⁴⁵ Many other winning bidders made different business decisions and complied with the Auction 901 performance obligations. Indeed, TexNet acknowledges that, as a result of its due diligence research, it was aware *before participating in Auction 901* of the interoperability concerns that had been impacting the pace of development of equipment in the 700 MHz band.⁴⁶ It nonetheless bid to receive Mobility Fund support in the auction.⁴⁷ TexNet's decision to commit to meeting its Mobility Fund performance obligations using 700 MHz spectrum, while aware of problems in developing and making available mobile units for the lower 700 MHz Band, was its own independent business judgment, not a circumstance beyond its control.

13. Nor is application of the rule in these circumstances inconsistent with the underlying purpose of the auction default payment rule. In adopting the rule, the Commission explained that it was imposing this default payment requirement to ensure that Mobility Fund auction winners fulfill their obligations and do not impose costs on the Commission and the USF, and to ensure the integrity of the

⁴³ See Request for Waiver at 7-8.

⁴⁴ See, e.g., *P&R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984) (upholding denials of waiver requests where Commission had found that licensee's selection of particular equipment and misplaced reliance on manufacturer's marketing statements were independent business judgements and thus attributable to circumstances under licensee's control); *Commnet Supply, LLC, Request for Waiver and Extension of PCS Construction Requirements, Request for Renewal of PCS License*, Order, 27 FCC Rcd 5832, (WTB 2012) (denying requests for waiver and renewal of PCS license, noting that Commission "consistently rejected the argument that voluntary business decisions by a licensee, particularly those motivated by economic factors, create situations beyond the licensee's control that would justify an extension" of construction requirements), petition for reconsideration denied, Order, DA 18-820 (WTB Aug, 7, 2018).

⁴⁵ See, e.g., *Alpine PCS, Inc. et. al. Requests for Waiver of the Installment Payment Rules and Reinstatement of Licenses*, Memorandum Opinion and Order, 25 FCC Rcd 469, 507, para. 78 (2010) (noting that an auction participant "alone is responsible for its business judgments regarding its participation in the competitive bidding process"); *Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA*, Memorandum Opinion and Order, 15 FCC Rcd 25103, 25107, para. 10 (2000) (noting that a licensee's failure to properly organize and manage its business dealings is not a unique circumstance that warrants the granting of a waiver); *BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency Block*, Memorandum Opinion and Order, 15 FCC Rcd 17590, 17604-07, para. 27-30 (2000) (*BDPCS MO&O*) (finding that loss of expected source of funding cannot justify waiver of the Commission's rules and that the Commission is not required to "police the private business activities of each bidder"); *Interactive Video and Data Service (IVDS) Licenses, Requests to Extend Payment Deadline*, Memorandum Opinion and Order, 11 FCC Rcd 5240, 5242, para. 10 (1996) (noting that this standard regarding private business activities has been applied broadly to circumstances such as "zoning difficulties, interference from adjacent buildings, equipment delivery problems, and alleged fraudulent behavior.").

⁴⁶ Request for Waiver at 9.

⁴⁷ In the spectrum auction context, the Commission has observed that its default rules are intended to deter active participation in an auction when a bidder becomes aware that its ability to follow through on its auction commitment has become seriously imperiled. See *BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules*, Order, 12 FCC Rcd 3230 (1997) (upholding WTB's denial of request for waiver of payment rule where winning bidder knew that it was experiencing financial difficulties four days prior to close of auction, continued to place bids rather than withdraw, and then, after placing winning bids on seventeen licenses, defaulted on its obligation to make required down payments following close of auction).

auctions process.⁴⁸ The rule's key to achieving these goals is enforcement of a default payment obligation in the event the winning bidder fails to fulfill the required Mobility Fund obligations. For example, this payment obligation is intended to discourage bidders from bidding for funding if they have not established viable plans (and backup plans) for fulfilling their Mobility Fund service obligations in the event they place a winning bid.

14. TexNet argues that "it could not have anticipated that the industry plan adopted in the *700 MHz Interoperability Order* would not be employed within a sufficient amount of time for TexNet 4G to meet its build-out obligations."⁴⁹ This argument misses the point. TexNet has conceded that before it committed to take on its bid obligations, it was aware of problems in the development of the equipment that it sought to use. In effect, TexNet seeks to shift to the Commission the risk and costs of its decision to pursue a particular network technology, notwithstanding its own prior recognition of the risk associated with its 700 MHz licenses, and when many other auction winners adopted business plans to avoid such risks. This shift is precisely what the Commission sought to avoid when it adopted a default payment requirement in the *USF/ICC Transformation Order*.

15. The cases cited by TexNet involving waivers of construction deadlines for licensees⁵⁰ do not support waiver of the auction default rule. Unlike the example of an industry-wide construction extension granted to licensees in the Multichannel Video and Data Distribution Service (MVDDS) due to the lack of viable, affordable equipment in a specific band,⁵¹ here equipment is available to construct and deploy 3G and 4G systems in various spectrum bands. The waivers at issue in the decisions cited by TexNet do not involve the same policy considerations relevant to the underlying purposes of the auction default rule. As explained above, the default payment obligation is meant to discourage bidding by individual bidders who do not have established viable plans and backup plans for meeting their Mobility Fund performance obligations, thereby avoiding unwarranted delays in deploying wireless service to underserved areas. In the decisions cited by TexNet, the construction deadlines were waived for large numbers of similarly-situated licensees facing industry-wide challenges, not a single licensee seeking to escape the consequences of its own business decisions.⁵² Nor do the cases TexNet cites involve bidding for USF funds (or even for licenses in specific frequency bands) knowing of potential risks associated with that band, and where other winning bidders have demonstrated the ability to comply with such deadlines. We, accordingly, find that the decisions cited by TexNet do not support its argument, and TexNet's inability to fulfill its original implementation plan for meeting its performance obligation does

⁴⁸ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17814, para. 459-460. This rule is modeled on default rules in the spectrum auction context which serve the important purpose of deterring winning bidders from delaying decisions about whether to accept assignment of licenses until after the close of the auction. See e.g., *PCS Partners, L.P., Petition for Waiver and Request for Refund*, Order, 22 FCC Rcd 4143, 4147, para. 11 (2007) (internal citations omitted); *BDPCS MO&O*, 15 FCC Rcd at 17606-07, para. 30.

⁴⁹ Request for Waiver at 9.

⁵⁰ Request for Waiver at 9-10.

⁵¹ See *id.*, citing *Requests of Ten Licensees of 191 Licenses in the Multichannel Video and Data Distribution Service for Waiver of the Five-year Deadline for Providing Substantial Service*, Order, 25 FCC Rcd 10097 (2010) (*MVDDS Substantial Service Order*).

⁵² In the *MVDDS Substantial Service Order*, the Bureau concluded that due to the commercial unavailability of equipment to all MVDDS licensees, enforcement of the rule "would tend to slow, rather than accelerate, equipment development and service deployment." 25 FCC Rcd at 10102-03, para. 10.

not constitute a “special circumstance” that justifies grant of TexNet’s request.⁵³

16. Finally, we find that TexNet’s request for stay of enforcement of the auction default payment rule pending a determination on its Request for Waiver is moot. Subsequent to filing its request for stay, TexNet submitted its auction default payment, making it unnecessary to rule upon that request.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 4(i), 4(j), 5(c), 254, and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155(c), 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, TexNet’s Request for Waiver, dated January 24, 2014, is DENIED and TexNet’s Request for Stay of Enforcement of Bid Withdrawal Penalty dated January 24, 2014, is DISMISSED as moot.

18. 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

19. 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

⁵³ The other two cases cited by TexNet involved large numbers of similarly-situated licensees facing industry-wide challenges, rather than an independent business decision impacting a single winning bidder among many MF-I winning bidders. See Request for Waiver at 9-10, citing *Applications Filed by Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of Section 101.1011 of the Commission’s Rules and Extensions of Time to Construct and Demonstrate Substantial Service*, Memorandum Opinion and Order, 23 FCC Rcd 5894 (2008) (extending construction period for group of 678 Local Multipoint Distribution Service licensees for various factors including broad unavailability of equipment); *Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadlines for 132 WCS Licenses*, Order, 21 FCC Rcd 14134 (2006) (granting extension of construction period to all 2.3 GHz Wireless Communications Service licensees based on industry-wide challenges including technical problems and economic infeasibility of available equipment).