

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: May 15, 2019

Released: May 15, 2019

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau, in conjunction with the Rural Broadband Auctions Task Force and the Office of Economics and Analytics, grants Casey Mutual Telephone Company’s (Casey Mutual) petition for waiver of the November 5, 2018 letter of credit commitment letter deadline for the Connect America Fund Phase II auction (Auction 903).¹ In addition, we deny Allen’s T.V. Cable Service, d/b/a Allens Communications’ (Allens) petition for waiver of the requirement that an Auction 903 recipient obtain a standby letter of credit that covers the amount of support that has been disbursed plus the support that will be disbursed in the coming year.²

II. 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 made available up to \$1.98 billion over 10 years to service providers that commit to offer voice and broadband services meeting certain requirements to fixed locations in unserved high-cost areas.³ On August 28, 2018, we announced that there were 103 winning bidders in the auction, with the 10-year support amount totaling \$1.488 billion, and established the deadlines for winning bidders or their assignees to submit their long-form applications for Connect America Phase II support.⁴

3. In the *Phase II Auction Order*, the Commission adopted a two-phased auction application process.⁵ In the first phase, entities seeking to participate in the auction must have filed a short-form

¹ Petition for Waiver of Deadline for Filing a Letter of Credit Commitment Letter as an Attachment to FCC Form 683, AU Docket No. 17-182, WC Docket No. 10-90 (filed Jan. 4, 2019) (Casey Mutual Petition).

² Petition for Limited Waiver, WC Docket Nos. 10-90, 14-58 (filed Nov. 8, 2018) (Allens Petition).

³ 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*).

⁴ *Connect America Fund Phase II Auction (Auction 903) Closes; Winning Bidders Announced; FCC Form 683 Due October 15, 2018*, Public Notice, 33 FCC Rcd 8257 (WTB/WCB 2018) (*Auction 903 Closing Public Notice*).

⁵ *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*).

application (FCC Form 183) by March 30, 2018 in which they provided specific information and certified, under penalty of perjury, their qualifications.⁶ Commission staff reviewed these applications and determined whether the applicants were qualified to bid in the auction.⁷ In the second phase of the process, each winning bidder or its assignee must file a more comprehensive long-form application (FCC Form 683), which Commission staff is reviewing to determine if a long-form applicant should be authorized to receive support for its winning bids.⁸ Any long-form applicant that defaults prior to being authorized to receive support, including by failing to meet the long-form application submission deadlines, is subject to a forfeiture.⁹

4. As part of this long-form application process, long-form applicants were required to submit a letter by November 5, 2018 from a bank that meets the Commission's requirements committing to issue an irrevocable standby letter of credit, in the required form, to the long-form applicant.¹⁰ Once we announce that the long-form applicant is ready to be authorized, it then has 10 business days to submit a letter of credit meeting the Commission's requirements that covers the first year of support at a minimum and an attorney bankruptcy opinion letter.¹¹

5. The Commission adopted the requirement that all long-form applicants obtain a letter of credit in the 2016 *Phase II Auction Order*, explaining that letters of credit "are an effective means for accomplishing [the Commission's] role as stewards of the public's funds" because they "permit the Commission to immediately reclaim support" from recipients that are not meeting their Auction 903 obligations and that they "have the added advantage of minimizing the possibility that the support becomes property of a recipient's bankruptcy estate for an extended period of time, thereby preventing the funds from being used promptly to accomplish [the Commission's] goals."¹² Before a support recipient can receive its next year's support and each year's support thereafter, it must modify, renew, or obtain a new letter of credit to ensure that it is valued at a minimum at the total amount of support that has already been disbursed plus the amount of support that is going to be provided in the next year, subject to certain reductions when the support recipient has substantially met its service milestones.¹³ If an Auction 903 recipient does not meet its service milestones or take advantage of the opportunities to cure or pay back the relevant support, the Commission will draw on the letter of credit to recover all of the support that has been disbursed to the recipient.¹⁴ An Auction 903 recipient must only maintain an open letter of credit until the recipient has certified it has met the final service milestone and the certification has been verified.¹⁵

⁶ 47 CFR § 54.315(a); *Phase II Auction Order*, 31 FCC Rcd at 5981-86, paras. 95-110; *Auction 903 Procedures Public Notice*, 33 FCC Rcd at 1438-89, paras. 20-179.

⁷ *220 Applicants Qualified to Bid in the Connect America Fund Phase II Auction; Bidding to Begin on July 24, 2018*, Public Notice, 33 FCC Rcd 6171 (WCB/WTB 2018) (*Auction 903 Qualified Bidders Public Notice*); *Auction 903 Procedures Public Notice*, 33 FCC Rcd at 1512-20, paras. 289-313.

⁸ 47 CFR § 54.315 (b)-(c); *Phase II Auction Order*, 31 FCC Rcd at 5987-99, paras. 113-41.

⁹ *Phase II Auction Order*, 31 FCC Rcd at 6000-01, paras. 143-45.

¹⁰ 47 CFR § 54.315(b)(3); *Auction 903 Closing Public Notice*, 34 FCC Rcd at 8262, para. 16.

¹¹ 47 CFR § 54.315(b)(6)(v); *Auction 903 Closing Public Notice*, 34 FCC Rcd at 8264, paras. 17-18.

¹² *Phase II Auction Order*, 31 FCC Rcd at 5990, para. 120.

¹³ 47 CFR § 54.315(c)(1); *Phase II Auction Order*, 31 FCC Rcd at 5991, 5997, paras. 122, 135; *Connect America Fund et al.*, Order on Reconsideration, 33 FCC Rcd 1380, 1405, para. 64 (2018) (*Phase II Auction Reconsideration Order*); *Phase II Auction Order*, 31 FCC Rcd at 5997-98, para. 136.

¹⁴ *Phase II Auction Order*, 31 FCC Rcd at 6016-18, paras. 189-94.

¹⁵ *Id.* at 5991, para. 123.

6. *Casey Mutual's Petition.* Casey Mutual participated in Auction 903 and was assigned \$244,923.20 in total 10 years support to serve 107 locations in Iowa.¹⁶ Casey Mutual filed a long-form application but did not submit a letter of credit commitment letter by the November 5, 2018 deadline, mistakenly believing that it was not required to obtain a letter of credit.¹⁷ After Casey Mutual was notified that it had missed the deadline, it submitted a letter of credit commitment letter from a qualified bank with its long-form application in early January.¹⁸ Casey Mutual now seeks waiver of the November 5th deadline.

7. *Allens' Petition.* Allens participated in Auction 903 and was assigned \$1,776,732.60 in total 10 years support to serve 794 locations in Louisiana.¹⁹ Allens explains that it did not understand that the letter of credit was required to cover cumulative disbursed support and believed that the letter of credit was only required to cover the amount of support that would be disbursed in the upcoming year.²⁰ Allens claims that it is able to borrow limited capital from banks because it “operates in a high-risk area for major hurricanes,” and that the letter of credit requirements would “consume too much of the limited capital available to Allens to leave sufficient funds for the construction” of its Auction 903-funded project.²¹ Accordingly, Allens requests that the Commission permit Allens to obtain a letter of credit that will cover only the support that will be disbursed in the coming year.

III. DISCUSSION

8. Generally, the Commission’s rules may be waived for good cause shown.²² 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.²³

9. *Casey Mutual's Petition.* We find good cause to grant Casey Mutual’s petition for waiver. Therefore, we waive the November 5, 2018 deadline for letter of credit commitment letters and accept Casey Mutual’s letter of credit commitment letter as timely-filed.

10. First, we find that special circumstances warrant deviation from the Commission’s letter of credit commitment letter deadline. It is well-established precedent in the high-cost context and in other universal service programs that “confusion regarding the rules does not establish special circumstances that warrant deviation from the Commission’s rules.”²⁴ Auction 903 participants had the responsibility to

¹⁶ *Auction 903 Closing Public Notice*, 33 FCC Rcd 8257, Attach. A. Casey Mutual describes itself as “a rate-of-return cost incumbent local exchange carrier (ILEC) . . . that owns and operates approximately 205 ILEC access lines in a single, very rural Iowa exchange area” Casey Mutual Petition at 4.

¹⁷ Casey Mutual Petition at 4-5.

¹⁸ *Id.* at 5.

¹⁹ *Auction 903 Closing Public Notice*, 33 FCC Rcd 8257, Attach. A. Allens describes itself as “a small family-owned and operated telecommunications company serving rural areas in south central Louisiana.” Allens Petition at 9.

²⁰ Allens Petition at 1.

²¹ *Id.* at 1-4.

²² 47 CFR § 1.3.

²³ 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)) (*Northeast Cellular*).

²⁴ *Petitions for Waiver of Universal Service High-Cost Filing Deadlines et al.*, Memorandum Opinion and Order, 31 FCC Rcd 12012, 12014, para. 8 (2016); *Federal-State Joint Board on Universal Service et al.*, Order, 22 FCC Rcd 4946, 4949, para. 7 (WCB 2007); *Federal-State Joint Board on Universal Service et al.*, Order, 19 FCC Rcd 17493, 17494, para. 5 (WCB 2004). See also *Requests for Waiver by Freehold Regional High School District Englishtown, New Jersey et al.*, Order, 19 FCC Rcd 2983, 2985, para. 4 (WCB 2004) (denying a petition for waiver in the E-rate

(continued....)

conduct due diligence regarding the Auction 903 requirements and obligations prior to participating in the auction.²⁵ Nevertheless, in the context of other auctions, Commission bureaus have granted waivers of post-auction long-form application filing deadlines “when minor, inadvertent, post-auction delinquencies did not disrupt the auction process, nor undermine the Commission’s policy of facilitating rapid implementation of service to the public.”²⁶ Here, Casey Mutual was able to obtain a letter of credit commitment letter from a qualified bank while Commission staff was still reviewing the other portions of Casey Mutual’s otherwise timely filed application and prior to the final February 25, 2019 long-form application submission deadline for ETC designation documentation and audited financial statements from certain applicants.²⁷ Accordingly, even though Casey Mutual missed the November 5th letter of credit commitment letter deadline, the oversight did not delay the Commission’s long-form application review process or the provision of voice and broadband service to consumers living in the areas where Casey Mutual was awarded support.²⁸

11. Second, we find that it serves the public interest to grant Casey Mutual’s waiver petition. The Commission adopted the long-form application filing process so that Commission staff could “conduct a more extensive review of the winning bidders’ qualifications to receive support”²⁹ A letter of credit commitment letter facilitates this review by giving the Commission assurance that the long-form applicant will be able to obtain a letter of credit upon being deemed ready to authorize so that the Commission will be able to reclaim disbursed support if the long-form applicant becomes authorized and does not meet its obligations.³⁰ Because Casey Mutual submitted its letter of credit commitment letter during the application review process, Commission staff still has the opportunity to fully evaluate Casey Mutual’s qualifications in a timely fashion.³¹ We conclude that it will serve the public interest for Commission staff to take this opportunity to evaluate the qualifications of an applicant that has otherwise substantially complied with the application deadlines, has expressed a willingness to serve the consumers in its winning bid areas, and has provided the required assurance that it will obtain a letter of credit that

(Continued from previous page) _____

context after finding that “[c]onfusion by an applicant’s staff does not constitute special circumstances for a waiver”); Casey Mutual Petition at 4 (noting that Casey Mutual’s General Manager “did not understand a letter of credit commitment letter to be required for bidders who did not intend to borrow funds to finance their construction obligations”).

²⁵ *Auction 903 Procedures Public Notice*, 33 FCC Rcd at 1471-72, paras. 111-19.

²⁶ See, e.g., *Request of Tallie Colville for Waiver of Auction 91 Form 301 Filing Deadline for Construction Permit for New FM Station, Diamond Lake, Oregon*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 14216 (AD-MB 2011) (*Tallie Colville Order*) (granting a waiver of the long-form application filing deadline where the applicant explained that it “was not ready to submit the application by the filing deadline”); *Request of BKM Enterprises for Waiver of Auction No. 68 Form 301 Filing Deadline Application for Construction Permit for New FM Station, Perry, Florida*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 15221 (AD-MB 2007) (*BKM Enterprises Order*) (granting the petition for waiver of an applicant that submitted its long-form application late because the applicant did not understand that it was required to file a long-form application); *Silver Palm Communications, Inc.*, Order, 17 FCC Rcd 6606 (CWD-WTB 2002) (*Silver Palm Communications Order*) (granting the petition for waiver of an applicant that missed the deadline “due to inadvertence and unawareness that the long-form application was due”); *City Page & Cellular Services, Inc. d/b/a City Beepers et al.*, Order, 17 FCC Rcd 26109 (CWD-WTB 2002) (granted the petitions for waiver of seven applicants that claimed to miss the deadline “due to inadvertence and/or unawareness that the long-form applications were due”).

²⁷ Casey Mutual Petition at 5 (explaining that Casey Mutual’s General Manager “worked with due speed to identify a qualifying lender” and that it “received the required letter of credit commitment letter and a short form letter of credit.”).

will protect the public's funds.³² Had we found Casey Mutual in default for missing the deadline, we may have precluded an otherwise qualified applicant from being authorized to receive support, delaying the provision of voice and broadband service in these areas.³³

12. Our decision to grant Casey Mutual's petition for waiver does not necessarily mean that Casey Mutual will be found qualified to receive Auction 903 support. Our final decision about whether a long-form applicant is qualified to receive Auction 903 support will be based on a long-form applicant's entire application and will be announced in a future public notice. If we announce that Casey Mutual is ready to be authorized, it will have 10 business days to submit a letter of credit and bankruptcy opinion letter meeting the Commission's requirements and will not be authorized to receive Auction 903 support until such documentation is deemed acceptable.

13. *Allens' Petition.* We do not find good cause to waive the letter of credit requirements for Allens, and thus deny its petition for waiver.

14. We find that Allens has not established special circumstances that would warrant waiver of the Commission's letter of credit rules. The Commission adopted its letter of credit rules in 2016 and clearly explained that the value of the letter of credit must increase to cover both support in the coming year and support that had been disbursed so far.³⁴ We acknowledge Allens' claims that service providers operating in hurricane-prone areas may have difficulty obtaining access to capital and may wish to maintain sufficient reserves to address potential storm outages.³⁵ However, all entities that participated in Auction 903 were required to acknowledge that they have the "sole responsibility for investigating and evaluating all technical, marketplace, and regulatory factors that may have a bearing on the level of Connect America Fund Phase II support it submits as a bid" and were "strongly encourage[d] . . . to review all underlying Commission orders and to assess all pertinent economic factors relating to the deployment of service in a particular area."³⁶ Like any other Auction 903 participant, Allens had the responsibility of understanding Auction 903 rules and requirements and taking any economic challenges

(Continued from previous page) _____

²⁸ Cf. *Connect America Fund et al.*, Memorandum Opinion and Order, 30 FCC Rcd 8967, 8968, para. 4 (2015) (finding that for the rural broadband experiments "[s]trict enforcement by the Bureau of the filing requirements adopted by the Commission was appropriate given the purpose of the rural broadband experiments and [the Commission's] commitment not to allow the rural broadband experiments to delay the offer of model-based support to price cap carriers"); *Connect America Fund et al.*, Order, 30 FCC Rcd 772, 774, para. 5 (WCB 2015) ("Denying the [rural broadband experiment] waiver requests and proceeding to identify next-in-line bidders fulfills the Commission's objective for the rural broadband experiments to inform key decisions that the Commission would be making regarding the design of the competitive bidding process that will occur in Phase II of the Connect America Fund, while not delaying implementation of Phase II").

²⁹ *Phase II Auction Order*, 31 FCC Rcd at 5980, para. 92.

³⁰ *Id.* at 5990, para. 120.

³¹ Casey Mutual Petition at 6 ("Because Casey Mutual has obtained the required letter of credit commitment letter and will obtain the required letter of credit, grant of the requested waiver will not frustrate the core purpose of the rules.").

³² *Id.* at 5 (stating that Casey Mutual "has already invested nearly \$300,000 in engineering services and materials . . . to support its targeted [Auction 903] project").

³³ *Id.* at 6 (claiming that "Casey Mutual is uniquely positioned to deliver on the Commission's stated objective of rapid distribution of funding and similarly rapid deployment of modern, multi-purpose networks").

³⁴ *Phase II Auction Order*, 31 FCC Rcd at 5997, para. 135.

³⁵ Allens Petition at 1-7.

³⁶ *Auction 903 Procedures Public Notice*, 33 FCC Rcd at 1471-72, paras. 111-19.

of serving an area into account while deciding whether to participate in the auction, how much support to seek through the auction, and where to bid. As we explained above, the fact that an Auction 903 participant misunderstood the Auction 903 program rules does not constitute special circumstances.³⁷

15. Our conclusion that Allens has not demonstrated special circumstances is sufficient grounds for denying this petition.³⁸ Nevertheless, we also are not persuaded that granting this waiver petition would serve the public interest. The Commission adopted its letter of credit requirements so that it can reclaim support if a recipient has not met its Auction 903 obligations and to minimize the possibility that the support will become part of the recipient's bankruptcy estate for an extended period of time.³⁹ Allens claims that permitting it to obtain a letter of credit that covers only the coming year of support "at most slightly increases the Commission's possible financial exposure by a few hundred thousand dollars."⁴⁰ However, even a few hundred thousand dollars is a significant amount of support that could be reclaimed and meaningfully repurposed for funding future broadband deployment.⁴¹ We are also not convinced by Allens' claim that its current value suggests that the Commission "would not be exposed at all," given that a company's financial position could change over the Auction 903 six-year build-out period.⁴²

16. We also disagree with Allens' contention that the Commission's decision to establish the *Uniendo a Puerto Rico Fund* and the *Connect USVI Fund* to make additional universal service support available to Puerto Rico and the Virgin Islands provides justification for granting Allens' petition.⁴³ Allens claims that the Commission's decision to make available support demonstrates that "vulnerability to hurricanes can justify different treatment for Universal Service purposes."⁴⁴ The Commission has proposed making \$631 million available for long-term support in these areas,⁴⁵ like the support offered through Auction 903, and has also sought comment on potential mechanisms for protecting the support during a ten-year term, including letters of credit.⁴⁶ Thus, even in areas devastated by hurricanes, the Commission is mindful of its responsibility to protect the public's funds when making long-term support available to carriers, although Commission action on that Notice remains pending.

17. We acknowledge that the letter of credit requirement imposes costs on entities, particularly small entities like Allens,⁴⁷ but the Commission has explicitly denied other requests from

³⁷ See *supra* para. 10 & n.24.

³⁸ See *Northeast Cellular*, 897 F.2d at 1166.

³⁹ *Phase II Auction Order*, 31 FCC Rcd at 5990, para. 120.

⁴⁰ Allens Petition at 7-8.

⁴¹ A number of Auction 903 winning bidders were assigned less than "a few hundred thousands dollars" over a 10-year period to deploy voice and broadband services meeting our requirements in high-cost areas. *Auction 903 Closing Public Notice*, 33 FCC Rcd 8257, Attach. A.

⁴² Allens Petition at 8.

⁴³ *Id.* at 7-8.

⁴⁴ *Id.*

⁴⁵ *The Uniendo a Puerto Rico Fund and the Connect USVI Fund*, Order and Notice of Proposed Rulemaking, 33 FCC Rcd 5404, 5412-28, paras. 28-98.

⁴⁶ *Id.* at 5421, para. 69.

⁴⁷ Allens Petition at 5-7 (claiming that its bank would "treat each dollar of the letter of credit as loaned, such that Allens would have to pay interest on the full amount but would be unable to actually borrow the funds to use for its project," and that "security should not come at the expense of financially starving [Auction 903] winning bidders of the capital needed to actually extend its plant to the unserved consumers").

small entities to further reduce the required value of the letter of credit.⁴⁸ While the Commission recognized that “some entities may still find that participating in the auction is cost-prohibitive or that they are unable to place competitive bids” as a result of the letter of credit requirement, it was not persuaded that it should “put [its] ability to recover a significant amount of support at risk if these same entities were to participate and later discover that they are unable to meet the Phase II auction obligations and unable to repay the Commission for their compliance gap.”⁴⁹ Consistent with this precedent, we conclude that the importance of upholding the Commission’s responsibility as the steward of the public’s funds outweighs the potential costs for the applicant and the risk that Allens may not be able to proceed with its Auction 903 project if its waiver petition is not granted.

18. Finally, we find that it would potentially undermine the results of Auction 903 to permit Allens to cover only a portion of its support with a letter of credit. Other Auction 903 participants that did conduct proper due diligence and understood the rules may have placed less competitive bids or bid to serve fewer locations to account for the letter of credit requirement, and other entities may not have participated in the auction for this reason. It would be inequitable to apply a different rule to Allens to account for challenges that Allens was required to consider and factor into its bidding decisions prior to and during the auction.

19. For these reasons, we conclude that granting Allens’ petition for waiver would not serve the public interest and deny Allens’ petition. Allens’ long-form application remains pending, and if Allens’ long-form application is deemed ready to authorize, Allens will have the opportunity to obtain a letter of credit and bankruptcy opinion letter that meets the Commission’s requirements and be authorized to receive support. If Allens instead decides not to pursue its winning bids or otherwise defaults, it will be subject to forfeiture.⁵⁰

IV. ORDERING CLAUSES

20. 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, 0.291, and 1.3 of the Commission’s rules, 47 CFR §§ 0.91, 0.291, 1.3, that this Order IS ADOPTED.

21. IT IS FURTHER ORDERED that the petition for waiver filed by Casey Mutual Telephone Company IS GRANTED as described herein.

22. IT IS FURTHER ORDERED that the petition for waiver filed by Allen’s T.V. Cable Service, Inc. d/b/a Allens Communications IS DENIED as described herein.

23. 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 Anne Monteith
Chief
Wireline Competition Bureau

⁴⁸ *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1406-08, paras. 67-70; *Phase II Auction Order*, 31 FCC Rcd at 5998, para. 137.

⁴⁹ *Phase II Auction Reconsideration Order*, 33 FCC Rcd at 1408, para. 69.

⁵⁰ *Phase II Auction Order*, 31 FCC Rcd at 6000-01, paras. 143-45.