

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Farmers Mutual Telephone Company
Applicant for Phase II Connect America Fund
File No.: EB-IHD-19-00029973
FRN No.: 0003747722
NAL/Acct. No.: 202032080013

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: October 11, 2019

Released: October 11, 2019

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. The Connect America Fund (CAF) Phase II (CAF-II)1 Auction (Auction 903) was conducted to award financial support to service providers who committed to increasing broadband services in areas of great need. The Federal Communications Commission (FCC or Commission) took steps to protect the integrity and proper functioning of Auction 903 by advising auction participants to diligently prepare to meet all auction requirements and by establishing a penalty for default. Farmers Mutual Telephone Company (FMTC or Company)2 was a winning bidder in Auction 903, but withdrew its application for support before receiving its award. By defaulting on its winning bid, the Company hindered the disbursement of funds that could have otherwise been productively used to increase broadband access to unserved or underserved areas. Accordingly, we propose a penalty of \$3,000 on the Company for apparently defaulting on its winning bid.

II. BACKGROUND

2. FMTC is a rural Cooperative headquartered in Bellingham, Minnesota. FMTC provides broadband, cable TV and communications services primarily in Lac qui Parle County, Minnesota.3

3. The Commission conducted Auction 903 between July 24, 2018 and August 21, 2018, to allocate CAF-II monetary support to certain eligible areas4 across the United States. Auction 903 was

1 The Connect America Fund Phase II is part of the Commission’s reform and modernization of its universal service support programs.

2 Any entity that is a “Small Business Concern” as defined in the Small Business Act (Pub. L. 85-536, as amended) may avail itself of rights set forth in that Act, including rights set forth in 15 U.S.C. § 657, “Oversight of Regulatory Enforcement,” in addition to other rights set forth herein.

3 See Farmers Mutual Telephone Company, Auction 903 FCC Form 183 Application, File No. 0008153704, (filed Mar. 29, 2018), (FMTC Short-Form Filing).

4 See Wireline Competition Bureau Releases List and Map of Eligible Census Blocks for the Connect America Fund Phase II Auction (Auction 903), AU Docket No. 17-182, WC Docket No. 10-90, Public Notice, 32 FCC Rcd 10381

slated to award up to \$198 million in annual support, a total of \$1.98 billion over ten years, in ongoing high-cost universal service support to service providers that committed to offering voice and broadband services in unserved areas.⁵ Using a multiple-round, reverse auction, Auction 903 was intended to close the digital divide for all Americans, including those in the rural areas of our country.⁶

4. In establishing procedures for Auction 903, the Commission was explicit as to the requirements a bidder must meet and the consequences for falling short of those requirements, including the penalties for default.⁷ In a February 1, 2018 Public Notice (*Phase II Auction Procedures Public Notice*), the Commission established a bidding process with clear dates and deadlines.⁸ Each bidder was first required to file FCC Form 183 (Short-Form Application) no later than March 30, 2018.⁹ Bidders were required to provide information in the Short-Form Application that demonstrated their baseline financial qualifications and technical capabilities in order to establish eligibility.¹⁰ After reviewing the Short-Form Applications, the Commission announced the applicants qualified to participate in Auction 903.¹¹

5. Once Auction 903 bidding began, the Commission conducted a multi-round, descending clock auction.¹² The minimum geographic areas established by the Commission for bidding in Auction 903 were Census Block Groups (CBGs) that contained one or more eligible census blocks, identified in a list released by the Commission's Wireline Competition Bureau (WCB) in December 2017.¹³ The list of CBGs included approximately 214,000 eligible census blocks, located in approximately 30,300 CBGs.¹⁴

6. On August, 28, 2018, the Commission released a Public Notice identifying the 103 winning bidders who had won \$1.488 billion in support over a ten-year period.¹⁵ Winning bidders were given the opportunity to assign some or all of their winning bids to related entities by September 14,

(WCB 2017) (*Eligible Census Block List Public Notice*). The list of census blocks can be found at <https://www.fcc.gov/files/caf2auctionpublishblockcsy>.

⁵ *Connect America Fund Phase II Auction Scheduled for July 24, 2018 Notice and Filing Requirements and Other Procedures for Auction 903*, AU Docket No. 17-182, WC Docket No. 10-90, Public Notice, 33 FCC Rcd 1428, para. 1 (2018), (*Phase II Auction Procedures Public Notice*).

⁶ *Id.* at 1428, paras. 1-2.

⁷ *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 6000, para. 143 (2016), (*Phase II Auction Order and/or FNPRM*); *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1471-2, paras. 111-119.

⁸ *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1432, para. 10.

⁹ *Id.*

¹⁰ *Id.* at 1438-9, para. 21.

¹¹ *See 220 Applicants Qualified to Bid in the Connect America Fund Phase II Auction (Auction 903), Bidding to Begin on July 24, 2018*, AU Docket No. 17-182, WC Docket No. 10-90, Public Notice, 33 FCC Rcd 6171, 6176, paras. 27-28 (Rural Broadband Task Force/WTB/WCB 2018) (*Qualified Bidders Public Notice*).

¹² *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1493, para 199.

¹³ *See Eligible Census Block List Public Notice*, 32 FCC Rcd at 10381.

¹⁴ *Id.*

¹⁵ *See Connect America Fund Phase II Auction (Auction 903) Closes; Winning Bidders Announced; FCC Form 683 Due October 15, 2018*, AU Docket No. 17-182, WC Docket No. 10-90, Public Notice, 33 FCC Rcd 8257 (Rural Broadband Task Force/WTB/WCB 2018) (*Auction 903 Closing Public Notice*).

2018.¹⁶ Additionally, winning bidders were required to submit a post-auction application for support, FCC Form 683 (Long-Form Application), no later than October 15, 2018.

7. The Company timely submitted its Short-Form Application to participate in Auction 903¹⁷ and was a successful bidder, winning \$348,991.60 of support for eight CBGs covering 163 locations in Minnesota. The Company also timely filed its Long-Form Application on October 8, 2018.¹⁸ On February 22, 2019, the Company notified the Rural Broadband Auctions Task Force, WCB, that it would default on its winning bid for CBG Number 270731802001 because 95 of the 98 areas in that CBG were in its traditional ILEC service territory and default was the most cost-effective option to resolve the location discrepancy.¹⁹ On June 7, 2019, WCB referred FMTC and another defaulting bidder to the Enforcement Bureau for enforcement action.²⁰

III. DISCUSSION

8. In establishing the procedures for Auction 903, the Commission was unambiguous in the requirements each bidder must meet and the consequences of failing to meet any requirement, stating:

Any Auction 903 winning bidder or long-form applicant will be subject to a forfeiture in the event of a default before it is authorized to begin receiving support. A winning bidder or long-form applicant will be considered in default and will be subject to forfeiture if it fails to timely file a long-form application, fails to meet the document submission deadlines, is found ineligible or unqualified to receive Phase II support by the Bureaus on delegated authority, and or otherwise defaults on its winning bids or is disqualified for any reason prior to the authorization of support. Any such determination by the Bureaus shall be final, and a winning bidder or long-form applicant shall have no opportunity to cure through additional submissions, negotiations, or otherwise. **Agreeing to such payment in the event of a default is a condition for participating in the Phase II auction** (emphasis added).²¹

Because the Company apparently partially defaulted on its Auction 903 winning bidder obligations, we find that the Company apparently willfully violated the Commission's rules and orders governing Auction 903.

9. Under Section 503(b)(1) of the Communications Act of 1934, as amended (the Act), any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.²² In order to impose such a forfeiture penalty, the Commission

¹⁶ *Id.* at 8259-60, paras. 9-13.

¹⁷ See FMTC Short-Form Filing.

¹⁸ See Farmers Mutual Telephone Company, Auction 903 FCC Form 683 Application, File No. 0008153704, (filed Oct. 8, 2018) (FMTC Long-Form Filing).

¹⁹ See *Connect America Fund Phase II Auction Support for 611 Winning Bids Ready to be Authorized*, 2019 WL 2443206, Attach. B (Rural Broadband Task Force/OEA/WCB 2019) (*Auction 903 June 2019 Public Notice*); FMTC Long-Form Filing, Attach. Other (8), Default on Bid for CBG 270731802001, filed Feb. 22, 2019 (FMTC Letter).

²⁰ *Auction 903 June 2019 Public Notice*, 2019 WL 2443206 at Attach. B.

²¹ *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1520, para. 314.

²² See 47 U.S.C. § 503(b)(1)(B); 47 CFR § 1.80(a)(1); see also 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 18 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section

must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.²³ The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule.²⁴

10. By withdrawing its application for support for one of its eight CBGs, the Company apparently partially defaulted on its winning bids for Auction 903 in apparent violation of section 1.21004(a) of the Commission's rules and the procedures established specifically for Auction 903.²⁵ Pursuant to section 1.21004(a), a winning bidder of a Commission auction that, for any reason, is not subsequently authorized to receive support has defaulted on its bid and is liable for a default payment.²⁶ Section 1.21004(b) authorizes the Commission to calculate the default payment by a method established in a public notice prior to competitive bidding. In Auction 903, however, the Commission concluded that it would impose a forfeiture in lieu of a default payment.²⁷ Furthermore, the Company agreed to this default payment as a condition to participating in Auction 903.²⁸

11. That the Company partially defaulted and for economic reasons, because it was the "most cost-effective option,"²⁹ does not absolve it from forfeiture for its default. The prohibition against default in section 1.21004 applies regardless of the reason for default and imposes a measured penalty directly correlated to the amount of support awarded with a cap to prevent outsized penalties. Moreover, we reiterate that the penalties for default were clearly stated in the *Phase II Auction Procedures Public Notice* before bidding ever began, so the Company can reasonably be expected to have considered the associated penalty both into its decision to bid for support, and the decision to subsequently default on its bid.

12. The Company's failure to adhere to the established auction procedures was disruptive to the integrity and efficiency of the auctions process. The Commission adopted the forfeiture policy for Auction 903 "to impress upon recipients the importance of being prepared to meet all requirements for the post-selection review process and to emphasize the requirement that participants conduct a due diligence review to ensure that they are qualified to participate in the auction and meet its terms and conditions."³⁰ Therefore, participants were expected to plan diligently to fulfill the obligations undertaken in Auction 903, including planning for any difficulties or other contingencies that arose during the process. By becoming a successful bidder and later choosing not to proceed with its service plans and the obligations it undertook for Auction 903, the Company hindered the disbursement of funds that could have gone to another provider, and thereby further delayed the advancements in broadband offerings in the CBGs where it defaulted on its winning bid. Furthermore, defaulting on bids imposes a cost to the CAF-II in administrative time spent on reviewing the bid and awarding the support. Likewise, default negatively impacts the residents of the corresponding CBG in lost opportunities and delays in launching affordable

503(b) context. See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (*Southern California Broadcasting Co.*).

²³ See 47 U.S.C. § 503(b); 47 CFR § 1.80(f).

²⁴ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, para. 4 (2002) (forfeiture paid).

²⁵ *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1520-22, paras. 314-316.

²⁶ 47 CFR § 1.21004(a).

²⁷ *Phase II Auction Order*, 31 FCC Rcd at 6000, para. 143; *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1521, para. 315.

²⁸ *Id.* at 1521, para. 314.

²⁹ FMTC Letter.

³⁰ *Phase II Auction Order*, 31 FCC Rcd at 6001, para. 145.

services.

13. The Commission's *Forfeiture Policy Statement*³¹ specifies that the Commission shall impose a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(E) of the Act, 47 U.S.C. § 503(b)(2)(E), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."³² Moreover, section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of such act, *irrespective of any intent* to violate . . . any rule or regulation of the Commission . . ."³³ As discussed herein, the Company agreed, prior to participating in Auction 903, to be subject to a forfeiture in the event of default. Additionally, the Company was cautioned to carefully craft its plans to meet all auction requirements and to prepare for any complications that could occur.³⁴ In considering these factors as well as the procedures established for Auction 903 and the *Forfeiture Policy Statement*, we believe that a forfeiture is warranted against the Company for its apparent willful violation of section 1.21004 of the Commission's rules and the procedures established for Auction 903.

14. We also find that the Company has apparently committed one violation by defaulting on one of its eight winning bids, and is therefore apparently liable for a forfeiture of \$3,000. For Auction 903, the Commission established a base forfeiture of \$3,000 per violation in the event of an auction default, meaning there would be a separate violation for each geographic unit subject to a bid.³⁵ The Commission deemed a \$3,000 base forfeiture appropriate, explaining that it was equivalent to the base forfeiture usually imposed for failing to file required forms or information with the Commission, as the Commission would be prevented from assessing a winning bidder's qualifications. Acknowledging that not all defaults would relate to the failure to submit the required forms or information, the Commission nonetheless concluded that for administrative simplicity and to provide bidders with certainty as to the base forfeiture that would apply for all pre-authorization defaults, it was reasonable to subject all bidders to the same \$3,000 base forfeiture per violation. Therefore, the Company's default in one geographic unit subjects it to a \$3,000 base forfeiture.

15. The \$3,000 base forfeiture is consistent with the cap established for default penalties in Auction 903. To prevent the base forfeiture amount from being disproportionate to the amount of a winning bidder's bid, the Commission limited the total base forfeiture for Auction 903 to 5% of the bidder's total assigned support for the CBG in which it was defaulting.³⁶ The Commission regarded 5%

³¹ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17,087, 17,113 (1997), *recons. denied* 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*); 47 CFR § 1.80(b).

³² *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-101, para. 27.

³³ 47 U.S.C. § 312(f)(1) (emphasis added). The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. *See, e.g., Southern California Broadcasting Co.*, 6 FCC Rcd at 4388.

³⁴ *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1471-2, paras. 111-119.

³⁵ *Id.*

³⁶ *Phase II Auction Order*, 31 FCC Rcd at 6000-01, para. 144; *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1521, para. 315. This would occur in situations where the dollar amount associated with the bid is low. For example, assume Bidder A's winning bid includes 100 CBGs for \$100,000 over the 10-year support term. We may impose a base forfeiture of \$5,000 (5% of \$100,000) because otherwise the base forfeiture would be \$300,000 (\$3,000 x 100 CBGs), which is three times the entire bid amount. In contrast, if Bidder B's winning bid includes

of the total bid amount as not unduly punitive, while providing sufficient incentive for auction participants to diligently inform themselves of the obligations associated with participation in the auction.³⁷ The Company's winning bid in default amounted to \$130,999.00, thereby capping the maximum forfeiture at \$6,550.00, which is 5% of the Company's total support won in the area of default. Thus, in accordance with the *Auction 903 Procedures Public Notice*, the \$3,000 forfeiture does not exceed 5% of the Company's winning bid in default.

16. Finally, after considering all the circumstances presented in the instant case, we conclude that a departure from the base forfeiture is not warranted here. For Auction 903 defaults, the Commission allowed for adjustment of the total base forfeiture, upward or downward, based on the criteria set forth in the Commission's forfeiture guidelines, notwithstanding the 5% limitation on base forfeitures as discussed above.³⁸ However, on balance, we find that there are no other factors present in the instant case that would justify a departure from the established base forfeiture. Accordingly, we find that a forfeiture in the amount of \$3,000.00 against the Company is appropriate here.

IV. ORDERING CLAUSES

17. **ACCORDINGLY, IT IS ORDERED**, pursuant to section 503(b) of the Communications Act³⁹ and section 1.80 of the Commission's rules,⁴⁰ that Farmers Mutual Telephone Company is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of three thousand dollars (\$3,000.00) for its willful violation of section 1.21004(a) of the Commission's rules,⁴¹ and the procedures established specifically for Auction 903 in the *Phase II Auction Procedures Public Notice*.

18. **IT IS FURTHER ORDERED**, pursuant to section 1.80 of the Commission's rules,⁴² that within thirty (30) calendar days of the release date of this Notice, Farmers Mutual Telephone Company **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture consistent with paragraph 21 below.

19. Farmers Mutual Telephone Company shall send electronic notification of payment to Jeffrey Gee and to Genevieve Ross, Enforcement Bureau, Federal Communications Commission, at Jeffrey.Gee@fcc.gov and Genevieve.Ross@fcc.gov, on the date said payment is made. Payment of the forfeiture must be made by wire transfer, credit card, or ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system).⁴³ The

100 CBGs for \$7,000,000 over the support term, we may impose a base forfeiture of \$300,000 (\$3,000 x 100 CBGs), which is 4.3% of the total bid.

³⁷ *Mobility Fund Phase I Auction Procedures Public Notice*, 27 FCC Rcd at 4777, para. 187; *Tribal Mobility Fund Phase I Auction Procedures Public Notice*, 28 FCC Rcd at 11692, para. 214.

³⁸ See 47 U.S.C. § 503(b)(2)(B); 47 CFR § 1.80(b)(8), note to paragraph (b)(8); *Phase II Auction Order*, 31 FCC Rcd at 6000-01, para. 143; *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1521, para. 315.

³⁹ 47 U.S.C. § 503(b).

⁴⁰ 47 CFR § 1.80.

⁴¹ 47 CFR § 1.21004(a).

⁴² 47 CFR § 1.80.

⁴³ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

Commission no longer accepts forfeiture payments by check or money order. Below are instructions that payors should follow based on the form of payment selected:⁴⁴

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to RROGWireFaxes@fcc.gov on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), enter the letters “FORF” in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN).⁴⁵ For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission’s Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select “Pay bills” on the Fee Filer Menu, and select the bill number associated with the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and then choose the “Pay by Credit Card” option. Please note that there is a \$24,999.99 limit on credit card transactions.
- Payment by ACH must be made by using the Commission’s Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by ACH, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select “Pay bills” on the Fee Filer Menu and then select the bill number associated to the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and choose the “Pay from Bank Account” option. Please contact the appropriate financial institution to confirm the correct Routing Number and the correct account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

20. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554.⁴⁶ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

21. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.16 and 1.80(f)(3) of the rules.⁴⁷ The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, ATTN: Enforcement Bureau, Investigations and Hearings Division, and must include the NAL/Account Number referenced in the caption. The statement must also be e-mailed to Jeffrey Gee and to Genevieve Ross,

⁴⁴ For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

⁴⁵ Instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁴⁶ See 47 CFR § 1.1914.

⁴⁷ 47 CFR §§ 1.16, 1.80(f)(3).

Enforcement Bureau, Federal Communications Commission, at Jeffrey.Gee@fcc.gov and Genevieve.Ross@fcc.gov.

22. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation.

23. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability For Forfeiture shall be sent, by Certified Mail Return Receipt Requested, to Karin Jahnke, Farmers Mutual Telephone Company, 2nd Street South, Bellingham, MN 56212.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Chief
Enforcement Bureau