

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

In the Matter of)	
)	
Rural Digital Opportunity Fund)	WC Docket No. 19-126
)	
The Rural Digital Opportunity Fund Auction (Auction 904))	AU Docket No. 20-34
)	
Connect America Fund)	WC Docket No. 10-90

ORDER

Adopted: June 30, 2020

Released: June 30, 2020

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau), in conjunction with the Rural Broadband Auctions Task Force and the Office of Economics and Analytics, resolves a petition for waiver filed by Johnson Telephone Company (Johnson) of the rule that prohibits entities that defaulted on all of their Connect America Fund Phase II (Auction 903) bids from participating in the Rural Digital Opportunity Fund (Auction 904).¹ We find that Johnson has not demonstrated good cause to waive the Commission’s Auction 904 eligibility rule and, accordingly, deny the petition.

II. BACKGROUND

2. The Commission’s eligibility requirements for Auction 904 bar applicants that defaulted on their entire Auction 903 award from participating in Auction 904.²

3. *Johnson’s Petition.* Johnson, a rural local exchange carrier headquartered in Remer, Minnesota, participated in Auction 903 and bid successfully for \$81,272 in support over 10 years to serve 47 locations in one census block group in Minnesota.³ Johnson subsequently notified the Bureau that it would default on its one winning bid.⁴ On October 11, 2019, the Enforcement Bureau found that Johnson apparently had defaulted on its entire bid and proposed a \$3,000 penalty for Johnson, which conceded liability and paid on November 14, 2019.⁵

¹ Petition for Waiver, AU Docket No. 20-34, WC Docket Nos. 19-126, 10-90 (filed Apr. 13, 2020) (Johnson Petition).

² 47 CFR § 54.803(d); *Rural Digital Opportunity Fund; Connect America Fund*, WC Docket Nos. 19-126, 10-90 Order, 35 FCC Rcd 686, 721, para. 77 (2020) (*Rural Digital Opportunity Fund Order*).

³ Johnson Petition at 2; *Notice of Apparent Liability for Forfeiture*, 34 FCC Rcd 9965, 9967, para. 7 & n.18 (EB 2019) (*Johnson NAL*) (stating that Johnson notified the Wireline Competition Bureau through email on October 19, 2018, that it would default on its winning bid but did not provide an explanation as to why it defaulted).

⁴ *Notice of Apparent Liability for Forfeiture*, 34 FCC Rcd at 9967, para. 7 & n.18.

⁵ Johnson Petition at 2-3; *Johnson NAL*, 34 FCC Rcd at 9969, para. 14.

4. Johnson now petitions for waiver of the Commission's Auction 904 eligibility rule barring applicants that defaulted on all of their Auction 903 bids so that Johnson can participate in Auction 904.⁶ Johnson claims that it had no warning that any penalties other than the \$3,000 could be assessed for default.⁷ It further claims the Commission's rule that bans it from participation "constitutes an extremely harsh penalty for defaulting on [one census block group]," but then allows partial defaulters to participate with Auction 903 defaults "[that] involved far more [census block groups]."⁸ Johnson states that "[it] will not make [the] mistake again and will bid more carefully during the [Rural Digital Opportunity Fund] auctions."⁹

III. DISCUSSION

5. Generally, the Commission's rules may be waived for good cause shown.¹⁰ 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.¹¹ We do not find good cause to waive the Auction 904 eligibility requirements for Johnson, and thus deny its petition for waiver.

6. We find that Johnson has not established special circumstances that would warrant waiver of the Commission's eligibility rules. First, Johnson argues that neither the Auction 903 procedures nor the NAL¹² gave it notice that there would be additional consequences to its default beyond the proposed \$3,000 forfeiture, and thus the Auction 904 eligibility rule barring Johnson should be waived.¹³ We disagree; Johnson had notice of the potential for additional consequences.

7. The Commission's rules generally governing competitive bidding for universal service support clearly state that "a winning bidder that defaults, in addition to being liable for a default payment, shall be subject to such measures as the Commission may provide, including but not limited to disqualification from future competitive bidding"¹⁴ The Enforcement Bureau's NAL makes no representations that paying the penalty is the full extent of consequences for Johnson and, indeed, makes repeated references to section 1.2004.¹⁵ In addition, the Commission adopted its Auction 904 rules on January 30, 2020, which are separate and apart from Auction 903 rules. Auction 903 rules do not apply to Auction 904 as they are two distinct auctions. Thus, while Auction 903's specific rules would not have provided notice to applicants of possible restrictions that might apply to future auctions, such as Auction 904, that have not yet been adopted, the Commission's general competitive bidding rules did provide notice of that possibility.

8. In fact, Johnson did have notice that the Commission was considering additional eligibility rules for Auction 904 at the time it paid its penalty. The *Rural Digital Opportunity Fund*

⁶ Johnson Petition at 3.

⁷ *Id.* at 5, 7.

⁸ *Id.* at 3, 5.

⁹ Johnson Petition at 4.

¹⁰ 47 CFR § 1.3.

¹¹ 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*).

¹² Johnson refers to the NAL as "the forfeiture order" in its Petition. See Johnson Petition at 7-8.

¹³ Johnson Petition at 3.

¹⁴ See 47 CFR § 1.21004(c); see generally *Rural Digital Opportunity Fund Order*, 35 FCC Rcd at 686; *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949 (2016) (*Phase II Auction Order and/or FNPRM*).

¹⁵ Johnson Petition at 7 (claiming the NAL "gave no indication that [its] [proposed] forfeiture [was] not the entire penalty for [Johnson's] default"); see also *Johnson NAL*, 34 FCC Rcd at 9968, paras. 10-11.

Notice of Proposed Rulemaking was adopted on August 1, 2019, and sought comment on whether “there are any eligibility restrictions that should be placed on CAF Phase II auction winning bidders that defaulted on their winning bids?”¹⁶ The *Notice* was published in the Federal Register on August 21, 2019, and commenters had the opportunity to submit comments and reply comments to the Commission within 30 and 60 days, respectively, of the release of the *Notice*.¹⁷ Johnson did not file a comment on the eligibility rule. Johnson paid the forfeiture for defaulting on its winning bid on November 14, 2019, more than three months after the Commission had provided notice that it might adopt eligibility restrictions in Auction 904 for bidders that had defaulted in Auction 903. Accordingly, Johnson had notice of the potential Auction 904 program rules and Johnson’s purported lack of notice of the eligibility rule for Auction 904 before it defaulted does not constitute special circumstances justifying a waiver.

9. Second, to the degree Johnson may be arguing that it would not have defaulted on its Auction 903 winning bid had it known specifically at the time of default that it would have subsequently been ineligible to participate in Auction 904, that too is unavailing. The Commission made it clear in Auction 903 that defaulting on a bid was a serious matter, and for that reason it decided to impose forfeiture penalties on defaulting applicants in Auction 903. The Commission’s goal in adopting the Auction 903 forfeiture policy was “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.”¹⁸ Johnson’s “failure to adhere to the established auction procedures was disruptive to the integrity and efficiency of the [Auction 903] process” and the decision to default should not have been made lightly.¹⁹ Thus, the implication of Johnson’s argument—that it made a calculated decision to default on its Auction 903 obligations, not a decision that was compelled by economic hardship, and it would not have done so if it had notice of this Auction 904 rule—does not establish good cause for a waiver.

10. Third, Johnson claims that “[i]t is doubtful that the Commission realized the harsh impact of this policy upon a small company like [Johnson] that had bid for, won and then defaulted upon a single small census block group in the CAF Phase II auction.”²⁰ Johnson goes on to state that “[i]t seems very unfair for [Johnson] to be banned entirely from [Auction 904] participation for defaulting [on one census block], while an entity that had won . . . [many] blocks . . . and [partially] defaulted . . . would be wholly free to participate in the [Rural Digital Opportunity Fund] auctions.”²¹

11. We disagree with Johnson that the Commission’s decision—to bar participants that defaulted on all of their winning bids while allowing participants that defaulted on a portion of their bids with more census block groups—is “unduly harsh and inequitable.”²² The Commission adopted its Auction 904 eligibility requirements so that the disbursement of funds would not be hindered by applicants with a known *complete* default history that “could have otherwise been productively used to increase broadband access to unserved or underserved areas.”²³ As we stated above, the Commission’s eligibility rules for Auction 904 enforce the notion from Auction 903 that “failure to adhere to the

¹⁶ See *Rural Digital Opportunity Fund et al.*, WC Docket Nos. 19-126, 10-90, Notice of Proposed Rulemaking, 34 FCC Rcd 6778, 6804, para. 80 (2019) (*Rural Digital Opportunity Fund NPRM*).

¹⁷ See *Rural Digital Opportunity Fund NPRM*, 34 FCC Rcd at 6778.

¹⁸ *Phase II Auction Order*, 31 FCC Rcd at 6001, para. 145.

¹⁹ Johnson NAL, 34 FCC Rcd at 9968, para. 12.

²⁰ Johnson Petition at 4.

²¹ *Id.* at 5.

²² *Id.*

²³ Johnson NAL, 34 FCC Rcd at 9965, para. 1.

established auction procedures [i]s disruptive to the integrity and efficiency of the auctions process.”²⁴ The Commission “expects all bidders to act in good faith and [takes] voluntary defaults very seriously.”²⁵

12. Moreover, the Commission was aware of the consequences of barring entities that had defaulted on all Auction 903 bids, including small entities like Johnson, from participating in Auction 904. The Commission knew that Johnson and other applicants had fully defaulted on all of their bids when it adopted Auction 904 eligibility rules in January of 2020.²⁶ While Johnson was the only one of the defaulters who only defaulted in 1 census block group, other defaulters (who are also now barred from Auction 904) defaulted on fewer total locations and lower support amounts;²⁷ thus, Johnson’s default does not establish special circumstances.

13. The Commission concluded that barring participants that defaulted on all of their Auction 903 winning bids, whether the total was one or several, will help eliminate the risk of participants who chose not to follow through with their service plans and obligations at all, delaying the advancement of broadband offerings to locations that completely lack voice and broadband service.²⁸ A default on all winning bids “negatively impacts the residents of the corresponding census block group in lost opportunities [for several years] to secure affordable services.”²⁹ Unlike applicants that fully defaulted on their winning bids, applicants that partially defaulted, whether the total was small or large, still have the opportunity to promptly pursue delivering voice and broadband to areas that otherwise lack service. Likewise, the Commission’s eligibility rules will help reduce the burden on the Commission of evaluating already known circumstances of a prior default applicant.

14. Our conclusion that Johnson has not demonstrated special circumstances is sufficient grounds for denying this petition.³⁰ Nevertheless, we are not persuaded that granting Johnson’s petition for waiver would serve the public interest. We do not believe that it is in the public interest to waive the Commission’s Auction 904 eligibility rules so that a party that made a seemingly calculated decision to default in Auction 903 can participate in another auction, potentially beating out earnest participants and further jeopardizing broadband deployment to unserved areas.

IV. ORDERING CLAUSES

15. 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.

²⁴ *Phase II Auction Order*, 31 FCC Rcd at 6001, para. 145.

²⁵ See e.g., *Connect America Fund Phase II Auction Support for 822 Winning Bids Ready to be Authorized; Bid Defaults Determined*, AU Docket No. 18-172, WC Docket No. 10-90, Public Notice, 34 FCC Rcd 2076, 2076-77 (WCB 2019) (*Second Ready to Authorize Public Notice*).

²⁶ See *Second Ready to Authorize Public Notice*, 34 FCC Rcd at 2124-25, Attach. B (announcing Auction 903 defaulters that notified the Commission they would no longer be pursuing some or all of their winning bids, including full defaults by Fidelity Communications Company; Hanson Communications, Inc.; Johnson Telephone Company; MGW Networks, LLC; SyncWave, LLC; Total Highspeed, LLC; Townes Wireless, Inc.; and WPS); *Connect America Fund Phase II Auction Support for 1,122 Winning Bids Ready to be Authorized*, AU Docket No. 18-172, WC Docket No. 10-90, Public Notice, 34 FCC Rcd 6223, 6285, Attach. B (WCB 2019) (announcing Crocker Communications, Inc. was in default for all winning bids); *Connect America Fund Phase II Auction Support for 150 Winning Bids Ready to be Authorized*, Public Notice, AU Docket No. 18-172, WC Docket No. 10-90, 35 FCC Rcd 1911, 1925, Attach. B (WCB 2020) (stating that Clearsky was in default for all winning bids).

²⁷ See *Second Ready to Authorize Public Notice*, 34 FCC Rcd at 2124-25, Attach. B.

²⁸ See *Johnson NAL*, 34 FCC Rcd at 9968-69, para. 12.

²⁹ See *id.*

³⁰ See *Northeast Cellular*, 897 F.2d at 1166.

16. IT IS FURTHER ORDERED that the petition for waiver filed by Johnson Telephone Company, Inc. IS DENIED as described herein.

17. 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