

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
ClearSKY Systems, Inc.
File No. EB-IHD-20-00031639
NAL/Acct. No. 202132080023
FRN No. 0025446428

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 25, 2021

Released: February 25, 2021

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 observe all auction requirements and by establishing a forfeiture penalty for default. ClearSKY Systems, Inc. (ClearSKY or Company)2 was a winning bidder in Auction 903 but defaulted on its bids by withdrawing its application for support before receiving its award. By defaulting on all nine of the bids it was awarded, the Company hindered the disbursement of funds that could have otherwise been productively used to increase broadband access to unserved or underserved areas. Furthermore, ClearSKY failed to resolve substantive deficiencies in its long-form application during the bid process, and ultimately failed to submit its audited financial statements, which was a requirement of all winning bidders, despite numerous requests from the Commission’s Wireline Competition Bureau (WCB). Accordingly, we propose a forfeiture of \$56,370.71 against the Company for its apparent violations of section 1.21004(a) of the Commission’s rules and the procedures established specifically for Auction 903.

II. BACKGROUND

2. Legal Framework. In February 2018, the Commission established a bidding process and deadlines for Auction 903.3 The process required each bidder to file its FCC Form 183 (Short-Form Application) no later than March 30, 2018.4 Each bidder also had to provide information in its Short-

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 Connect America Fund Phase II Auction Scheduled for July 24, 2018 Notice and Filing Requirements and Other Procedures for Auction 903, Public Notice, AU Docket No. 17-182, WC Docket No. 10-90, 33 FCC Rcd 1428,1432, para. 10 (2018) (Phase II Auction Procedures Public Notice).

4 Id.

Form Application that demonstrated its baseline financial qualifications and technical capabilities to establish its eligibility.⁵ Additionally, winning bidders were required to submit a post-auction application for support, FCC Form 683 (Long-Form Application), no later than October 15, 2018.⁶ The Commission specified that applicants would be subject to a forfeiture in the event of default before they were authorized to begin receiving support:⁷

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.**⁸

3. The Commission required each bidder filing long-form applications to submit its audited financial statements to the Commission.⁹ When the Commission announced the closure of Auction 903 and its winning bidders on August 28, 2018, it made clear that Long-Form applicants must file “financial statements from the prior fiscal year (i.e., 2017) that have been audited by an independent certified public accountant” by February 25, 2019.¹⁰ The Commission established that Long-Form applicants who fail to timely submit their audited financial statements may be subject to an additional \$50,000 base forfeiture penalty that is separate from and cumulative with any forfeiture penalties assessed for default.¹¹

4. *Factual background.* ClearSKY is an Illinois-based Internet service provider (ISP) that provides broadband packages for residential, business, and corporate purposes.¹² ClearSKY has provided

⁵ *Id.* at 1438-9, para. 21.

⁶ *See id.* at 1438, para. 20. *See also Connect America Fund Phase II Auction (Auction 903) Closes Winning Bidders Announced FCC Form 683 Due October 15, 2018*, Public Notice, AU Docket 17-182, WC Docket 10-90, 33 FCC Rcd 8257, para. 2 (2018) (*Auction 903 Closing Public Notice*). Additionally, letter of credit commitment letters, and detailed technology and system design descriptions were due November 5, 2018. *See Auction 903 Closing Public Notice*, 33 FCC Rcd at 8263, para. 16. Winning bidders were also required to produce Eligible Telecommunications Carrier designations from state governments and certification letters by February 25, 2019. *See id.*

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*). *See also Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1471-2, paras. 111-119 (stating that applicants are required to conduct their own due diligence and certify they were capable of meeting CAF-II obligations).

⁸ *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1520-21, para. 314 (emphasis added).

⁹ *Id.* at 1519-20, para. 311.

¹⁰ *Auction 903 Closing Public Notice*, 33 FCC Rcd at 8263, para. 16.

¹¹ *Phase II Auction Order and/or FNPRM*, 31 FCC Rcd at 6000, para. 143, n.303 (“We note that above we adopt a separate forfeiture that will apply only to entities that have demonstrated that they have two years’ operating history and that certify they will submit their audited financials in their long-form application and then subsequently default by not submitting their audited financials. *See supra* Section VI.B.1 (Short Form Applications Process). We conclude that a different forfeiture is appropriate under those circumstances given that we will be relying on the certifications of entities that they will be submitting their financial information during the long-form stage in qualifying them to participate in the auction.”). *See Connect America Fund Phase II Auction Support for 150 Winning Bids Ready to be Authorized; Listed Auction 903 Long-Form Applications Must Submit Letters of Credit and Legal Counsel’s Opinion Letters by Thursday, March 19, 2020*, Public Notice, 35 FCC Rcd 1911, 1912 (WCB 2020) (*Auction 903 Authorization & Default Public Notice*).

¹² *See* ClearSKY, *About Us*, <https://csky.net/about-us-3/> (last visited Feb. 23, 2020).

internet connectivity to rural Illinois areas since 1999 and maintains its status as a locally owned and operated ISP.¹³

5. Between July 24, 2018 and August 21, 2018, the Commission conducted Auction 903 to allocate CAF-II monetary support to certain eligible areas¹⁴ across the United States. In Auction 903, the Commission planned to award up to \$198 million in annual support, a total of up to \$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.¹⁵ Auction 903 was intended to close the digital divide for all Americans, including those in the rural areas of our country.¹⁶ After reviewing the Short-Form Applications, the Commission announced the applicants qualified to participate in Auction 903.¹⁷

6. Once bidding began in Auction 903, the Commission conducted a multi-round, descending clock auction.¹⁸ 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 in December 2017.¹⁹ The list of CBGs included 210,647 eligible census blocks, located in 30,033 CBGs.²⁰ 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.²¹ Winning bidders were given the opportunity to assign some or all of their winning bids to related entities by September 14, 2018.²²

7. ClearSKY timely submitted its Short-Form Application to participate in Auction 903²³ and was a successful bidder, winning \$127,414.20 of support for nine CBGs covering 207 locations in Illinois.²⁴ All winning bidders were required to complete a Long-Form Application using an interactive online submission portal with a number of sequential filing windows, each with a corresponding deadline,

¹³ See ClearSKY, Home, <https://csky.net/> (last visited Feb. 23, 2020).

¹⁴ See *Auction 903 Closing Public Notice*, 33 FCC Rcd at 8257, para. 1. See also *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1432, para. 1. See also *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 (WCB 2017) (*Eligible Census Block List Public Notice*). The list of census blocks can be found at <https://www.fcc.gov/files/caf2auctionpublishblockcsv>.

¹⁵ *Phase II Auction Procedures Public Notice*, 33 FCC Rcd 1428, para. 1 (2018).

¹⁶ *Id.* at 1428, paras. 1-2.

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

¹⁸ *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1493, para 199.

¹⁹ See *Eligible Census Block List Public Notice*, 32 FCC Rcd at 10381.

²⁰ *Revised 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, 33 FCC Rcd 1166 (2018).

²¹ See *Connect America Fund Phase II Auction (Auction 903) Closes; Winning Bidders Announced; FCC Form 683 Due October 15, 2018*, Public Notice, AU Docket No. 17-182, WC Docket No. 10-90, 33 FCC Rcd 8257 (2018) (*Auction 903 Closing Public Notice*).

²² *Id.* at 8259-60, paras. 9-13.

²³ See *Qualified Bidders Public Notice*, 33 FCC Rcd at 6184-95 (Attach. A: Qualified Bidders sorted by applicant name).

²⁴ *Auction 903 Closing Public Notice*, 33 FCC Rcd 8257 (Attach. A: Winning Bidders Summary).

for differing sets of information to, among other things, verify financial reliability.²⁵ Once all the filing deadlines had passed, the Company's Long-Form Application remained substantively incomplete. The Commission made subsequent requests to ClearSKY for the Company's missing information without success, whereupon WCB issued ClearSKY a demand letter on January 27, 2020.²⁶ The Commission's demand letter restated each substantive informational deficiency with the Company's Long-Form Application and provided a new deadline of February 26, 2020, for ClearSKY to provide the information requested by the Commission or be deemed in default pursuant to the terms of Auction 903.²⁷ The additional time granted by WCB for ClearSKY to provide the required information and cure its default extended by a year the original deadline for the Company to submit its audited financial statements, which should have been filed on February 25, 2019.²⁸

8. Contrary to the certification in its short-form application, the Company never submitted audited financial statements to WCB when required, or even later. Instead, on February 10, 2020, ClearSKY notified WCB that it would default on all nine of its winning bids.²⁹ The Company stated that it was underbid on the service locations it desired most, and left only with "a few census blocks, on the edge of our area."³⁰ Despite bidding on these service locations, ClearSKY asserted that it "should not be penalized" for only acquiring the "the blocks that nobody wanted."³¹ Upon receiving notification from the Company of its intent to default on all of its bids, WCB referred the Company to the Commission's Enforcement Bureau for enforcement action.³²

III. DISCUSSION

9. We find that the Company apparently willfully violated the Commission's rules and orders governing Auction 903 when it defaulted on its bids by failing to fulfill its obligations and when it failed to submit the required audited financial statements the Company agreed to provide when it applied to bid in Auction 903.³³

²⁵ *Auction 903 Closing Public Notice*, 33 FCC Rcd at 8290-91, Attach C, FCC Form 683: Application for Connect America Fund Phase II Auction Support – Instructions at 4-6 (explaining what is due sequentially on October 15, 2018, on November 5, 2018, and on February 25, 2019).

²⁶ See Letter from Kris Monteith, Chief, Wireline Competition Bureau, Federal Communications Commission, to Matthew Goluba, ClearSKY Systems, Inc, 1 (Jan. 27, 2020) (*Demand Letter*).

²⁷ See *id.* (explaining that "ClearSKY's long-form application still requires: 1) documentation demonstrating it has obtained an Eligible Telecommunications Carrier designation for the eligible census blocks covered by the winning bids and a petition for waiver of the deadline for submitting this documentation, 2) a description of the estimated project costs for all facilities that are required to complete the project and more information regarding how the project will be funded, 3) one year of audited financial statements, 4) a detailed network diagram that is certified by a professional engineer and a description of that engineer's qualifications if the engineer does not have a Professional Engineer license, 5) a detailed description of the technology and system design, 6) more information in the spectrum access attachment regarding ClearSKY's 3650-3700 MHz license and its plans for when the Part 90 rules sunset, and 7) a letter of credit commitment letter that meets the Auction 903 requirements, among other things.").

²⁸ See *id.* See also *Auction 903 Closing Public Notice*, 33 FCC Rcd at 8263, para. 16.

²⁹ Letter from Donna Olson, President, ClearSKY Sys. Inc, to Heidi Lankau, Wireline Competition Bureau, Federal Communications Commission, (Feb. 10, 2020) (*ClearSKY Default Letter*) (requesting that WCB consider "releasing us from this obligation.").

³⁰ *Id.*

³¹ *Id.*

³² See *Auction 903 Authorization & Default Public Notice*, 35 FCC Rcd at 1913

³³ *Id.*

10. By withdrawing its application for support, the Company defaulted on all nine of 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 903.³⁴ That the Company defaulted for logistical and/or financial reasons does not absolve it from its default.³⁵ 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.³⁶ In Auction 903, the Commission concluded that it would impose a measured forfeiture penalty directly correlated to a bidder's awarded support in lieu of a default payment.³⁷ Those forfeiture penalties for default were clearly stated in the *Phase II Auctions Procedures Public Notice* before bidding ever began, so the Company can reasonably be expected to have considered the anticipated forfeiture penalty both in its decision to bid for support, and in the decision to subsequently to default on its bids.³⁸

11. 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 of our requirements for the post-selection review process and to emphasize the requirement that they conduct a due diligence review to ensure that they are qualified to participate in the Phase II competitive bidding process and meet its terms and conditions."³⁹ 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 defaulting, and imposing additional delay of almost a full year in failing to respond to the Commission's request for the necessary information, the Company hindered the disbursement of funds that could have gone to another provider, and thereby further substantially delayed the advancements in broadband offerings in the nine CBGs where it defaulted on its winning bids.⁴⁰ 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 broadband and voice services in areas that continue to lack such services.

12. The Company further disrupted the integrity and efficiency of the auction when it failed to submit audited financial statements with its Long-Form Application, resulting in a further apparent willful violation.⁴¹ A Long-Form applicant that fails to submit its audited financial statements from the prior fiscal year is subject to an additional and distinct forfeiture penalty in addition to default.⁴² Despite

³⁴ 47 CFR § 1.21004; *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1520-22, paras. 314-316.

³⁵ *ClearSKY Default Letter* (ClearSKY requested "consideration in releasing us from this obligation" because it was outbid in its most desired CBGs and only won bids in the "blocks that nobody wanted.").

³⁶ 47 CFR § 1.21004.

³⁷ *Phase II Auction Order*, 31 FCC Rcd at 6000, para. 143; *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1521, para. 315.

³⁸ *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1521, para. 314.

³⁹ *Phase II Auction Order*, 31 FCC Rcd at 6001, para. 145.

⁴⁰ Winnings bidders that default cost the Commission a tremendous amount of resources because – in order to preserve the integrity of the auction process – the defaulted license must be completely re-auctioned (which substantially delays the provision of service to the residents inside areas of default). See *Qualified Bidders Public Notice*, 33 FCC Rcd at 1521, para. 316.

⁴¹ See *Demand Letter* at 1.

⁴² *Auction 903 Authorization & Default Public Notice* at *2 (noting that Long-Form applicants that fail to submit audited financial statements as required by the February 25, 2019 deadline are subject to a \$50,000 forfeiture.); see also *Phase II Auction Order*, 31 FCC Rcd at 5984-85, para. 104-05; see also *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1519-20, para. 311.

WCB's extension of the submission deadline to February 26, 2020,⁴³ ClearSKY still failed to submit audited financial statements to complete the Company's Long-Form Application.⁴⁴

13. 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.⁴⁵ In order to impose such a forfeiture penalty, the Commission 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.⁴⁶ 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.⁴⁷

14. The Commission's *Forfeiture Policy Statement*⁴⁸ 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."⁴⁹ 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 . . .*"⁵⁰

15. A monetary 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. Here, the Company agreed, prior to participating in Auction 903, to be subject to a forfeiture in the event of default, or upon its failure to satisfy the requirements of the *Phase II Auction Procedures Public Notice*. Additionally, the Company was cautioned to carefully craft its plans to meet all auction requirements and to prepare for any complications that could occur. 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.

16. In Auction 903, the Commission established a base forfeiture of \$3,000 per violation in the event of an auction default, meaning there would be separate violation for each geographic unit

⁴³ See *Demand Letter* at 1 (explaining that the ClearSKY "has significant deficiencies" including the absence of "one year of audited financial statements" that "must be uploaded and submitted to ClearSKY's [Long-Form application] prior to 6:00 p.m. ET on Wednesday, February 26, 2020.").

⁴⁴ See *ClearSKY Default Letter* (explaining that the Company does not want to be responsible for "the blocks that nobody wanted," and that ClearSKY requested to be released from bidder obligations instead of satisfying its duty to cure its long-form application and to serve its winning bid locations.).

⁴⁵ See 47 U.S.C. § 503(b)(1)(B); 47 CFR § 1.80(a)(1).

⁴⁶ See 47 U.S.C. § 503(b)(4); 47 CFR § 1.80(f).

⁴⁷ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, para. 4 (2002) (forfeiture paid).

⁴⁸ *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).

⁴⁹ *Forfeiture Policy Statement*, 12 FCC Rcd at 17,100-101, para. 27.

⁵⁰ 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.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

subject to a bid.⁵¹ 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. To prevent the base forfeiture amount from being disproportionate to the amount of a winning bidder's bid, however, the Commission limited the total base forfeiture for Auction 903 to 5% of the bidder's total assigned support for the CBGs in which it was defaulting.⁵² The Commission regarded 5% 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.⁵³

17. With regard to ClearSKY's default on nine winning bids, we find that the Company is apparently liable for a base forfeiture of \$6,370.71. Although the base forfeiture for such non-compliance is set at \$3,000 per violation, resulting in a base forfeiture of \$27,000 for ClearSKY's nine violations, as discussed above, the Commission limited the total base forfeiture to 5% of the Company's total assigned support in default for its CBGs.⁵⁴ In ClearSKY's case, the Company's total support for all nine of its bids in default was \$127,414.20, and the 5% cap for the Company's apparent forfeiture is \$6,370.71. Thus, in accordance with the *Auction 903 Procedures Public Notice*, we will limit the Company's forfeiture for defaulting on its nine winning bids to \$6,370.71.

18. In Auction 903, the Commission also established a base forfeiture of \$50,000 for Long-Form applicants who fail to submit audited financial statements to the Commission by the appropriate deadline.⁵⁵ Unlike the penalties assigned for default, the size of this forfeiture is not connected to the bidder's total amount of assigned support.⁵⁶ Because ClearSKY failed to submit audited financial statements to the Commission, we find that it is apparently liable for a base forfeiture of \$50,000.

⁵¹ *Phase II Auction Order*, 31 FCC Rcd at 6000-01, para. 144.

⁵² *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 total 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 100 CBGs for \$7,000,000 over the support term, we may impose a total base forfeiture of \$300,000 (\$3,000 x 100 CBGs), which is 4.3% of the total bid. *See Phase II Auction Order*, 31 FCC Rcd at 6000-01, para. 144 n.305.

⁵³ *Phase II Auction Order*, 31 FCC Rcd at 6000-01, para. 144. *See also 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.

⁵⁴ *Phase II Auction Order*, 31 FCC Rcd at 6000-01, para. 144.

⁵⁵ *Phase II Auction Order*, 31 FCC Rcd at 45984-85, para. 104; *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1519, para. 311.

⁵⁶ *See Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1519, para. 311 (noting that "any long form applicant... will be subject to a base forfeiture of \$50,000, which will be subject to adjustment upward or downward as appropriate" (emphasis added)). *See also Phase II Auction Order and/or FNPRM*, 33 FCC Rcd at 5984-85, paras. 104-105 & n.206 (noting that the \$50,000 base forfeiture was "large enough to create an incentive for bidders to take their obligation to get audited financial statements seriously," and that "[the] forfeiture will be applied per defaulting entity rather than per bid or minimum geographic unit.").

19. Finally, the Commission may also adopt upward or downward adjustments to forfeitures when appropriate.⁵⁷ Under section 1.80 of the Commission's rules, we may adjust a forfeiture upward for egregious misconduct, ability to pay and relative disincentive, an intentional violation, substantial harm, prior violations of Commission requirements, substantial economic gain, or repeated or continuous violations.⁵⁸ We may adjust a forfeiture downward for a minor violation, good faith or voluntary disclosure, a history of overall compliance, or an inability to pay.⁵⁹ The forfeiture guidelines listed in section 1.80 of the Commission's rules specifically "are intended as a guide for frequently recurring violations" and not "a complete or exhaustive list of violations."⁶⁰

20. 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.⁶¹ Upward or downward adjustments are similarly permitted to modify the total base forfeiture for Long-Form applicants' failure to submit audited financial statements.⁶² 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 forfeitures. Accordingly, we find that a forfeiture in the amount of \$6,370.71 against the Company is appropriate here for their default on nine winning bids. We also find that an additional forfeiture in the amount of \$50,000 against the Company is warranted here because of its failure to timely submit audited financial statements to the Commission. Therefore, in sum we propose a cumulative forfeiture in the amount of \$56,370.71 against ClearSKY.

IV. ORDERING CLAUSES

21. **ACCORDINGLY, IT IS ORDERED**, pursuant to section 503(b) of the Communications Act⁶³ and section 1.80 of the Commission's rules,⁶⁴ that ClearSKY Systems, Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of fifty-six thousand, three hundred and seventy dollars and seventy one cents (\$56,370.71) for its willful violation of section 1.21004(a) of the Commission's rules,⁶⁵ and the procedures established specifically for Auction 903 in the *Phase II Auction Procedures Public Notice*.

⁵⁷ See *Commission's Forfeiture Policy Statement & Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17110, para. 53 (1997) (citing 47 U.S.C. § 503(b)(2)(E)) (*1997 Forfeiture Guidelines*), *recon. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

⁵⁸ 47 CFR § 1.80(b)(9), Note to paragraph (b)(9). See also *1997 Forfeiture Guidelines*, 12 FCC Rcd at 17098–99, para. 22 (1997) (noting that "[a]lthough we have adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, we retain our discretion to depart from the guidelines and issue forfeitures on a case-by-case basis, under our general forfeiture authority contained in Section 503 of the Act").

⁵⁹ 47 CFR § 1.80(b)(9), Note to paragraph (b)(9).

⁶⁰ *1997 Forfeiture Guidelines*, 12 FCC Rcd at 17109-10, para. 53.

⁶¹ 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.

⁶² *Phase II Auction Procedures Public Notice*, 33 FCC Rcd at 1519, para. 311.

⁶³ 47 U.S.C. § 503(b).

⁶⁴ 47 CFR § 1.80.

⁶⁵ 47 CFR § 1.21004(a).

22. **IT IS FURTHER ORDERED**, pursuant to section 1.80 of the Commission's rules,⁶⁶ that within thirty (30) calendar days of the release date of this Notice, ClearSKY Systems, Inc. **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 25 below.

23. ClearSKY Systems, Inc. shall send electronic notification of payment to Jeffrey Gee, Kalun Lee, Rizwan Chowdhry, and Ryan McDonald of the Enforcement Bureau, Federal Communications Commission, at Jeffrey.Gee@fcc.gov, Kalun.Lee@fcc.gov, Rizwan.Chowdhry@fcc.gov, and Ryan.McDonald@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).⁶⁷ The 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:⁶⁸

- 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).⁶⁹ 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.

24. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 45 L Street,

⁶⁶ 47 CFR § 1.80.

⁶⁷ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

⁶⁸ 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.

⁶⁹ Instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

NENE, Washington, DC 20554.⁷⁰ 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.

25. 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.⁷¹ The written statement must be mailed to Jeffrey J. Gee, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 45 L Street, NE, Washington, DC 20554, and must include the NAL account number referenced in the caption. The statement must also be e-mailed to Jeffrey Gee, Kalun Lee, Rizwan Chowdhry, and Ryan McDonald of the Enforcement Bureau, Federal Communications Commission, at Jeffrey.Gee@fcc.gov, Kalun.Lee@fcc.gov, Rizwan.Chowdhry@fcc.gov, and Ryan.McDonald@fcc.gov. Until further notice, the Commission will not accept any hand or messenger delivered filings.

26. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits the following documentation: (1) federal tax returns for the past three years; (2) financial statements for the past three years prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status.⁷² Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation. Inability to pay, however, is only one of several factors that the Commission will consider in determining the appropriate forfeiture, and we retain the discretion to decline reducing or canceling the forfeiture if other prongs of 47 U.S.C. § 503(b)(2)(E) support that result.⁷³

27. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent, by first class mail and certified mail, return receipt requested, to Donna Olson, President, ClearSKY Systems, Inc., 7095 W. Waupecan Rd., Verona, IL 60479.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Chief
Enforcement Bureau

⁷⁰ See 47 CFR § 1.1914.

⁷¹ 47 CFR §§ 1.16, 1.80(f)(3).

⁷² 47 U.S.C. § 503(b)(2)(E).

⁷³ See, e.g., *Ocean Adrian Hinson, Surry County, North Carolina*, Forfeiture Order, 34 FCC Rcd 7619, 7621, para. 9 & n.21 (2019); *Vearl Pennington and Michael Williamson*, Forfeiture Order, 34 FCC Rcd 770, paras. 18–21 (2019); *Fabrice Polynice, Harold Sido and Veronise Sido, North Miami, Florida*, Forfeiture Order, 33 FCC Rcd 6852, 6860–62, paras. 21–25 (2018); *Adrian Abramovich, Marketing Strategy Leaders, Inc., and Marketing Leaders, Inc.*, Forfeiture Order, 33 FCC Rcd 4663, 4678-79, paras. 44-45 (2018); *Purple Communications, Inc.*, Forfeiture Order, 30 FCC Rcd 14892, 14903-904, paras. 32-33 (2015); *TV Max, Inc., et al.*, Forfeiture Order, 29 FCC Rcd 8648, 8661, para. 25 (2014).