

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

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

ORDER

Adopted: July 26, 2021

Released: July 26, 2021

By the Chief, Wireline Competition Bureau:

1. In this Order, the Wireline Competition Bureau, in conjunction with the Rural Broadband Auctions Task Force and the Office of Economics and Analytics, partially deny petitions submitted by AB Indiana LLC and LTD Broadband LLC¹ that seek waiver of the June 7, 2021 deadline requiring each Rural Digital Opportunity Fund Phase I auction (Auction 904) long-form applicant to demonstrate, with appropriate documentation, that it has been designated as an eligible telecommunications carrier (ETC) in each of the geographic areas for which it seeks to be authorized for Auction 904 support.² Consistent with the Commission’s direction in the *Rural Digital Opportunity Fund Order*, we find that these entities failed to engage in good faith efforts to pursue and obtain the required ETC designation from the states for which we deny their petitions.³

I. BACKGROUND

2. In the *Rural Digital Opportunity Fund Order*, the Commission adopted long-form application requirements that required applicants to submit extensive information detailing their respective qualifications to receive Auction 904 support.⁴ In doing so, the Commission concluded that such an approach would “best serve the Commission’s ability to determine whether the applicants are ultimately eligible for Rural Digital Opportunity Support authorization funding, providing a fair and efficient review process.”⁵ As part of the long-form review process, applicants were required to obtain ETC designations

¹ See AB Indiana Request for Waiver (filed June 4, 2021) (AB Indiana Request); Petition for Limited Waiver of LTD Broadband LLC, AU Docket No. 20-34, WC Docket Nos. 10-90, 19-126 (filed June 7, 2021) (LTD Petition). We note that AB Indiana also sought waiver of the requirement to provide audited financials by the June 7 deadline. Because of the action we take here today, and because Florida is the only state for which AB Indiana has filed a long-form application, we do not find it necessary to reach the merits of AB Indiana’s claim on that point and therefore dismiss the remainder of the petition as moot. Additionally, as explained below, LTD sought waiver of the deadline for its ETC designations in eight states; below, we address LTD’s waiver with regard to three states and defer our decision on the merits of its waiver in the remaining five states for future consideration.

² *Rural Digital Opportunity Fund; Connect America Fund*, Report and Order, 35 FCC Rcd 686, 727-28, para. 92. (2020) (*Rural Digital Opportunity Fund Order*).

³ *Rural Digital Opportunity Fund Order*, at 727, n.260 (“In considering such waiver requests, we direct the Bureau to determine whether an entity engaged in good faith efforts to obtain an ETC designation”).

⁴ *Id.* at 725, para. 86.

⁵ *Id.*

covering each of the geographic areas for which they sought to be authorized for support.⁶ Recognizing that requiring interested parties to obtain an ETC designation prior to participating in Auction 904 could preclude new entrants or smaller providers from participating in the auction, the Commission permitted applicants to obtain the required ETC designation after the close of the auction, so long as they were able to demonstrate, with appropriate documentation, that they had been designated as an ETC in the requisite areas.⁷ The Commission established a deadline for submitting this documentation of 180 days after the release of the public notice identifying Auction 904 winning bidders.⁸ This public notice was released on December 7, 2020, effectuating a deadline of June 7, 2021 for applicants to submit the required ETC documentation.⁹

3. Based on prior experience with the Rural Broadband Experiments and the CAF Phase II auction (Auction 903), the Commission also recognized that, in some cases, applicants may face delays in obtaining their ETC designations that could cause them to miss the June 7 deadline. In such instances, the Commission explained that an applicant could seek waiver of the ETC deadline if it anticipated that it would not be able to obtain the required designations within 180 days.¹⁰ Additionally, the Commission noted that it would presume that an applicant acted in good faith if it filed its ETC application with the relevant state authority within 30 days of the release of the public notice identifying Auction 904 winning bidders.¹¹ As noted above, this public notice was released on December 7, 2020, effectuating a deadline of January 6, 2021 for applicants to avail themselves of this “good faith” presumption.¹²

4. *Requests for Waiver.* Both AB Indiana and LTD Broadband submitted requests for waiver of the ETC documentation deadline on June 7, 2021.¹³ In its two-sentence request, AB Indiana seeks an extension of the requirement to provide documentation of its ETC designation in the state of Florida.¹⁴ Specifically, AB Indiana explains that it “engaged with the Florida Public Service Commission (PSC), but [has] not yet received such designation.”¹⁵ AB Indiana did not provide any additional detail in its request regarding when it filed its ETC application with the state or any discussions it had with Florida PSC staff.

5. Likewise, LTD seeks waiver of the requirement to demonstrate appropriate documentation of ETC designation in eight states—California, Iowa, Kansas, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas by the June deadline.¹⁶ For purposes of this Order, we focus solely on the portions of LTD’s request related to the documentation of its ETC designations in California, Kansas, and Oklahoma.

⁶ *Id.* at 727-28, para. 92.

⁷ *Id.* at 723, 727-28, paras. 81, 92. In addition to providing the relevant state or Commission ETC orders, the Commission required applicants to include documentation such as map overlays of the winning bid areas or charts listing designated areas. The Commission also required each applicant to submit a letter with its documentation from an officer of the company certifying that its ETC designation for each state covers the relevant areas where the winning bidders will receive support. *See id.* at 727-28, para. 92.

⁸ *Id.* at 727-28, para. 92.

⁹ *See Rural Digital Opportunity Fund Phase I Auction (Auction 904) Closes, Winning Bidders Announced, FCC Form 683 Due January 29, 2021*, Public Notice, 35 FCC Rcd 13888 (2020) (*Auction 904 Closing PN*).

¹⁰ *See Rural Digital Opportunity Fund Order*, at 723, n.230.

¹¹ *Id.* at 723, para. 81.

¹² *See supra* para. 3.

¹³ *See generally* AB Indiana Request; LTD Petition.

¹⁴ AB Indiana Request at 1.

¹⁵ *Id.*

¹⁶ LTD Petition at 3-7.

With regard to California, LTD explains that it did not discuss its potential ETC application with the California Public Utilities Commission (CPUC) until January 6—the deadline for applicants to avail themselves of the “good faith presumption”—and initially claimed that it filed its ETC designation application with the state on April 26.¹⁷ LTD later supplemented its petition to indicate that its ETC designation application actually had been filed with the CPUC on June 3.¹⁸ LTD argues that its ETC application likely would still be pending even if it had filed within the “good faith presumption” window, as evidenced by “the filing of waiver requests by a number of other RDOF winners, all of which cite the additional time it will take the CPUC to process, consider and approve ETC designations.”¹⁹

6. In Kansas and Oklahoma, LTD “made the decision to defer filing for strategic reasons.”²⁰ With regard to Kansas, LTD explains that it “anticipated aggressive intervention similar to what LTD Broadband experienced in Indiana and other RDOF auction winners experienced in Kansas” and thus delayed filing its ETC application until it could retain local counsel with the appropriate “level of experience and expertise to address anticipated adverse proceedings.”²¹ As a result, LTD states that it did not file its ETC application in Kansas until May 19, 2021.²² LTD requests a waiver of the deadline in Oklahoma for the same reasons, noting that it expected “aggressive intervention” that required it to obtain expert local counsel.²³ Consequently, LTD further explains that it did not file its ETC application and application for a Certificate of Convenience and Necessity (CCN) in Oklahoma until June 7, 2021. LTD argues that, even if it had filed its ETC application in Oklahoma within the 30-day “good faith presumption” window established by the Commission, it is unlikely that the application would have been approved by the deadline given that two other Auction 904 applicants with winning bids in Oklahoma are also seeking waiver of the ETC documentation deadline.²⁴

II. DISCUSSION

7. Generally, the Commission’s rules may be waived for good cause shown.²⁵ 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.²⁶

8. *AB Indiana Request.* We deny AB Indiana’s request to waive the deadline to submit documentation of its ETC designation in Florida. As noted above, AB Indiana failed to provide any rationale for its delay in meeting the June 7 documentation deadline. Moreover, AB Indiana did not file its ETC application with the state within the 30-day “good faith presumption” window; indeed, AB Indiana only filed its ETC application on June 7, 2021—the same day as the Commission’s established

¹⁷ LTD Petition at 3.

¹⁸ See Third Supplement to Petition for Limited Waiver of LTD Broadband LLC, AU Docket No. 20-34, WC Docket Nos. 10-90, 19-126, at Decl. of Corey Hauer (filed June 28, 2021) (LTD Third Supplement). N.b.: The facts in Mr. Twomey’s declaration have been noted. See Second Supplement to Petition for Limited Waiver of LTD Broadband, LLC, AU Docket No. 20-34, WC Docket Nos. 10-90, 19-126, at Decl. of Kristopher E. Twomey (filed June 23, 2021). The Commission takes seriously any possible misconduct of an attorney practicing before the Commission and this matter will be considered in the appropriate manner.

¹⁹ LTD Petition at 3.

²⁰ *Id.* at 8.

²¹ *Id.* at 4-5.

²² *Id.* at 5.

²³ *Id.* at 6.

²⁴ *Id.*

²⁵ 47 CFR § 1.3.

²⁶ 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)).

deadline.²⁷ Because AB Indiana’s request lacks any rationale to waive the deadline requirement and because the applicant failed to avail itself of the “good faith presumption” window, we do not find any good cause that warrants waiving the deadline established by the Commission with regard to AB Indiana’s ETC designation.

9. *LTD Broadband Petition.* We also deny LTD’s request to waive the deadline to submit documentation of its ETC designations in California, Kansas, and Oklahoma. As an initial matter, we note that LTD did not file its ETC application with any of these states within the 30-day “good faith presumption” window. Further, we do not find LTD’s contention that it delayed its filings in Kansas and Oklahoma because it anticipated that it would face opposition such that it would need to obtain experienced counsel to be a sufficient reason that demonstrates good cause to waive the ETC documentation deadline.

10. The Commission has recognized that a waiver may be warranted in some cases when a state commission takes longer than 180 days to designate a provider as an ETC; however, this observation was made with the understanding that an applicant is diligently and expediently pursuing its ETC application but the relevant state authority has failed to act by the Commission’s deadline through no fault of the applicant. For example, the Commission has noted that a waiver of the deadline would be appropriate if the applicant “has an ETC application pending with a state and the state’s next scheduled meeting at which it would consider the ETC application will occur after the 180-day window.”²⁸

11. Conversely, LTD waited until June 3—almost six months after the date of the release of the Auction 904 Closing Public Notice—to file its ETC designation with CPUC.²⁹ Specifically, LTD contends that it filed “upon obtaining guidance” as to whether CPUC would assert jurisdiction over its application. LTD’s argument, however, is belied by the fact that every other Auction 904 applicant seeking waiver of the deadline to provide documentation of its ETC designation in California managed to file their applications with the state in January, with the exception of one applicant that filed in early February.³⁰ Accordingly, we find that LTD has failed to provide a compelling rationale for waiving the deadline to provide documentation of its ETC designation in California.

12. Additionally, LTD delayed filing its applications with the Kansas and Oklahoma commissions for over five and six months, respectively, from the date of the release of the Auction 904 Closing Public Notice, finally filing with both states within a month of the Commission’s Auction 904 ETC designation deadline. Moreover, LTD admits that these delays were “for strategic reasons.”³¹ We do not consider an entity’s specific corporate strategy or business considerations for delaying the satisfaction of a Commission requirement to constitute special circumstances that would justify a waiver. Indeed, LTD fails to support its argument that it delayed filing its ETC designation applications with Kansas and Oklahoma for “strategic reasons.” Even assuming that it faced the opposition to its ETC designations in these states that it was anticipating, LTD fails to explain why it did not file its applications within a reasonable time frame and then seek advice from experienced local counsel to rebut any actual incurred opposition. Thus, we do not find LTD’s explanation that it needed over five months to secure

²⁷ See Application for Designation as an Eligible Telecommunications Carrier of AB Indiana LLC, Document No. 04555-2021 (filed June 7, 2021), available at <https://www.floridapsc.com/library/filings/2021/04555-2021/04555-2021.pdf>.

²⁸ See *Auction 904 Closing Public Notice*, 35 FCC Rcd at 13901, para. 37.

²⁹ LTD Third Supplement at Decl. of Corey Hauer.

³⁰ See, e.g., Petition of Cal.Net, Inc. for Waiver of Section 54.804(b)(3) of the Commission’s Rules, AU Docket No. 20-34, WC Docket Nos. 10-90, 19-126 (filed June 3, 2021) (Cal.Net Petition); Petition for Waiver of Hankins Information Technology, AU Docket No. 20-34, WC Docket Nos. 10-90, 19-126 (filed May 25, 2021) (Hankins Petition).

³¹ LTD Petition at 8.

competent counsel to be a sufficient reason to demonstrate good cause to grant its waiver. Nor would granting such a waiver on these grounds satisfy the independent requirement that it serve the public interest. Such a self-imposed delay would be inconsistent with the goal of the ETC filing deadline established in this proceeding, which is to expedite the provision of needed broadband service to these rural communities.

13. LTD further argues that, even if it had met the Commission's presumption of acting in good faith by filing its ETC application within 30 days of the Auction Closing Public Notice, it would not yet have received its ETC designation in California and Oklahoma, given that other Auction 904 applicants in the states have also sought waiver of the ETC deadline.³² Even if true, LTD misses the point here; regardless of whether it would or would not have received its ETC designation by the deadline, the Commission made clear that the Bureau should determine whether an entity engaged in good faith efforts to obtain an ETC designation when considering waiver requests.³³ While entities that filed their ETC designation applications with the relevant state authority within the initial 30-day window are entitled to a presumption that they acted in good faith, we must undertake an individual, fact-based analysis for entities that filed outside of that window to determine if they pursued their required ETC designations in good faith. Moreover, the purpose of the Commission's deadline for securing ETC designation is to encourage applicants to act diligently in order to allow the Commission to move as quickly as possible toward disbursing critical universal service support. Every month of delay by LTD in seeking ETC designation amounts to another month of delay in satisfying that important public interest objective.

14. LTD also observes that, in the context of Auction 903 long-form review, the Bureau "consistently waived the ETC certification deadline, determining that the benefits of additional time outweighed strict compliance with the deadline."³⁴ As a result, LTD argues, waiver is also in the public interest here in order to ensure the prompt deployment of voice and broadband service to the locations LTD has committed to serve.³⁵ At the outset, we note that the two examples of waivers sought by Auction 903 applicants that LTD cites—from Wisper ISP, Inc. and Plains Internet—are easily distinguishable from LTD's request. For example, Wisper obtained its certificate of authority to do business in Oklahoma more than three months before the ETC deadline for Auction 903 and filed its ETC designation application with the state more than two months before the deadline.³⁶ Moreover, Wisper's application was opposed by a third party less than a week before the ETC deadline, resulting in the state commission establishing a process that extended beyond the Commission's ETC deadline for Auction 903.³⁷ In the case of Plains Internet, the delay in filing its ETC application with the state of Texas was due to confusion over the whether the state would exercise jurisdiction over the applicant's service; Plains Internet initially filed for ETC designation with the Commission, but upon learning that the state did have jurisdiction, filed an application for designation in Texas two months in advance of the ETC deadline established by the Commission for Auction 903.³⁸ As the Bureau determined through its individual, fact-

³² See generally, Petition for Waiver of Resound Networks, LLC, AU Docket No. 20-34, WC Docket Nos. 10-90, 19-126 (filed June 4, 2021); Petition of Windstream Services, LLC and Windstream Communications, LLC for Waiver of ETC Designation Deadline, AU Docket No. 20-34 (filed June 1, 2021); Cal.Net Petition; Hankins Petition. We clarify that we are deferring determination of the merits of these waiver requests for future consideration.

³³ *Rural Digital Opportunity Fund Order* at 727, n.260.

³⁴ LTD Petition at 9-10.

³⁵ *Id.* at 9.

³⁶ *Connect America Fund Phase II Auction Support for 2,121 Winning Bids Ready to be Authorized*, Public Notice, 34 FCC Rcd 12384, 12385 (WCB 2019) (*Wisper Ready-to-Authorize PN*).

³⁷ *Id.*

³⁸ *Connect America Fund Phase II Auction Support for 611 Winning Bids Ready to be Authorized*, Public Notice, 34 FCC Rcd 4648, 4649 (WCB 2019) (*Plains Ready-to-Authorize PN*).

based analysis of the waiver requests, both Wisper and Plains Internet exhibited good faith in pursuing their ETC designations; in neither case did the applicant forgo filing its ETC designation application due to strategic business reasons, nor did they file with the appropriate state commission less than a month before the Commission's ETC deadline—as LTD did in Kansas—less than a week before the Commission's ETC deadline—as LTD did in California—or the day of the Commission's ETC deadline—as LTD did in Oklahoma. Thus, we do not find the past waiver grants cited by LTD to be persuasive in determining whether we should grant its waiver request in this instance.

15. Additionally, LTD's argument ignores the fact that alternative funding for broadband deployment is more readily available. When considering waivers of the Auction 903 ETC designation deadline, the Bureau recognized that another provider may not be positioned to deploy broadband and voice services in certain unserved and underserved areas for many years.³⁹ As a result, granting ETC designation deadline waivers to ensure expeditious broadband buildout in the areas in most need was clearly in the public interest, at least where delay was not undertaken for strategic reasons. Now, however, numerous federal and state programs have been established or are being established to promote and fund broadband deployment, and many providers have expressed interest in serving the areas that were eligible for Auction 904.⁴⁰ Thus, we find that requiring Auction 904 waiver requests to meet a "high hurdle" is warranted,⁴¹ particularly given that taking action on them could potentially make areas available for other federal and state broadband programs.

16. For all these reasons, we find that both AB Indiana and LTD fail to present special circumstances that would warrant a waiver of the requirement to demonstrate that they have obtained the necessary ETC designations by the June 7 deadline established by the Commission, and we find that grant of such waivers would not serve the public interest. Consequently, we deny their waivers in part and will release a public notice in the near future finding AB Indiana in default on its bids in Florida and LTD in default on its bids in California, Kansas and Oklahoma.⁴² Consistent with the Commission's direction in the *Rural Digital Opportunity Fund Order*, applicants who default will be subject to the applicable forfeiture under the Commission's rules, and defaults will be referred to the Enforcement Bureau.⁴³

³⁹ See *Wisper Ready-to-Authorize PN*, 34 FCC Rcd at 12386; *Plains Ready-to-Authorize PN*, 34 FCC Rcd at 4649. Specifically, the Bureau recognized that the late-filed ETC designations did not delay the provision of voice and broadband services to consumers living in the areas where support was awarded.

⁴⁰ See, e.g., National Telecommunications and Information Administration, *Notice of Funding Opportunity: Tribal Broadband Connectivity Program*, NTIA-TBC-TBCPO-2021-2006948 (June 3, 2021), available at <https://www.grants.gov/web/grants/view-opportunity.html?oppId=333974>; Oklahoma HB 2946 (enacted May 24, 2021) (providing up to \$42 million in tax rebates for broadband deployment), available at <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb2946&Session=2100>; National Telecommunications and Information Administration, *Notice of Funding Opportunity: Broadband Infrastructure Program*, NTIA-BROADBAND-INFRASTRUCTURE-PROGRAM-21 (May 19, 2021), available at <https://www.grants.gov/web/grants/view-opportunity.html?oppId=333684>; Florida Broadband Deployment Act of 2021, CS/CS/HB 1239, (enacted May 7, 2021) (establishing the Broadband Opportunity Program to award grants for broadband deployment), available at <https://www.flsenate.gov/Session/Bill/2021/1239/?Tab=BillText>; Kansas HB 2201 (enacted May 3, 2021) (providing up to \$85 million in grants over ten years for broadband deployment) available at http://www.kslegislature.org/li/b2021_22/measures/hb2201/.

⁴¹ See *WAIT Radio v. FCC*, 459 F.2d 1203, 1207 (D.C. Cir. 1972); *accord, Melcher v. FCC*, 134 F.3d 1143, 1163-64 (D.C. Cir. 1998).

⁴² A list of the census blocks subject to this order can be found at <https://www.fcc.gov/auction/904/releases>. See 47 CFR § 1.21004(a) ("A winning bidder has a binding obligation to apply for support by the applicable deadline. A winning bidder that fails to file an application by the applicable deadline or that for any reason is not subsequently authorized to receive support has defaulted on its bid").

⁴³ *Rural Digital Opportunity Fund Order* at 735-36, paras. 114-117 ("A recipient 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

(continued....)

III. ORDERING CLAUSES

17. 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, 0.131, 0.271, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.131, 0.271, 0.291, 1.3, that this Order IS ADOPTED.

18. IT IS FURTHER ORDERED that the petitions for waiver of the deadline for providing documentation of ETC designation for Auction 904 filed by AB Indiana, LLC and LTD Broadband, LLC, ARE DENIED IN PART as described herein.

19. IT IS FURTHER ORDERED that the petition for waiver of the deadline for providing audited financials for Auction 904 filed by AB Indiana, LLC, IS DISMISSED as described herein.

20. 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 A. Monteith
Chief
Wireline Competition Bureau

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deadlines outlined above, is found ineligible or unqualified to receive support, or otherwise defaults on its bid or is disqualified for any reason prior to the authorization of support”).