

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

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: March 25, 2022

Released: March 25, 2022

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau, in conjunction with the Rural Broadband Auctions Task Force and the Office of Economics and Analytics, deny a waiver request submitted by RHMD, LLC (RHMD)1 that seeks 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 RHMD failed to engage in good faith efforts to pursue and obtain the required ETC designation and deny its petition.3

II. 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 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

1 See RHMD, LLC Request for Waiver (dated June 7, 2021 and uploaded June 10, 2021); RHMD, LLC Request for Waiver (dated June 30, 2021 and uploaded July 5, 2021); Joint Petition for Limited Waivers, AU Docket No. 20-34, WC Docket Nos. 19-126, 10-90 (filed Nov. 23, 2021) (together RHMD Request).

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.

6 Id. at 727-28, para. 92.

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. *Request for Waiver.* RHMD submitted two nearly identical requests for waiver of the ETC documentation deadline – the first dated June 7, 2021 and the second dated June 30, 2021.¹³ In its brief request, RHMD seeks an extension of the requirement to provide documentation of its ETC designation in the state of Georgia.¹⁴ Specifically, RHMD states that its attorneys have filed the paperwork with the Georgia Public Service Commission (PSC), but the company has not received a decision.¹⁵ RHMD did not provide additional detail in its request regarding when it filed its ETC application with the state, whether it filed during the good faith presumption period, or discussions it had with Georgia PSC staff. On November 23, 2021, RHMD submitted another waiver request, stating that it had not previously submitted a request for waiver of the ETC documentation deadline, representing that it submitted its ETC application on May 7, 2021, and admitting that its ETC application was still pending with the Georgia PSC.¹⁶

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 from an officer of the company with its documentation 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* RHMD Request.

¹⁴ *Id.* We note that the first submission requests an extension until July 1, 2021, and the second submission requests an extension until August 1, 2021.

¹⁵ *Id.*

¹⁶ A2D, Inc and RHMD, LLC Joint Petition for Limited Waivers, AU Docket No. 20-34, WC Docket Nos. 19-126, 10-90 at 3, 5, 7, and 9 (filed Nov. 23, 2021).

III. DISCUSSION

5. Generally, the Commission's rules may be waived for good cause shown.¹⁷ 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.¹⁸

6. We deny RHMD's request to waive the deadline to submit documentation of its ETC designation in Georgia. In its request, RHMD simply stated that it required additional time because it is a small company and obtaining ETC designation takes a longer amount of time and requires more effort than is the case for a larger company.¹⁹ RHMD did not otherwise provide any details to substantiate this claim, nor did RHMD provide any other rationale for its failure to meet the June 7, 2021 documentation deadline. The Commission has been clear that obtaining ETC designation is the responsibility of the applicant, and every applicant is subject to the same requirements and deadlines.²⁰ 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 predicated on the understanding that an applicant is diligently and expeditiously pursuing its ETC application.

7. Based on staff research, RHMD does not appear to have filed its ETC application with the Georgia PSC on May 7, 2021, as stated, but rather on May 17, 2021.²¹ Regardless, neither date is within the 30-day good faith presumption window and either date is just a few weeks before the Commission's established deadline for submitting documentation of designation. To date, RHMD is still not designated as an ETC.²² Moreover, RHMD has failed to present information that justifiably explains why its request for ETC designation was filed so late or why it remains pending at the Georgia PSC. In particular, RHMD makes no claim that it acted in good faith to obtain its ETC designation in a timely manner, even while acknowledging the requirement to demonstrate good faith. Rather, RHMD cites as a basis for its waiver petition the dissolution of a joint venture that occurred on June 7, 2021 – i.e., five months *after* the ETC application filing date for the good faith presumption to apply and approximately one month *after* it did in fact file its ETC application. Therefore, RHMD may not avail itself of the “good faith presumption” window, and there is no other information that suggests waiving the deadline is warranted.

8. We also note that there are alternative funding programs for broadband deployment that are readily available—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 904.²³ Thus, we find that requiring Auction 904 waiver requests to meet a “high hurdle” is warranted,²⁴ particularly given that denying such requests could potentially make areas available for other federal and state broadband programs.

¹⁷ 47 CFR § 1.3.

¹⁸ 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)).

¹⁹ See RHMD Request.

²⁰ See *Rural Digital Opportunity Fund Order* at 723, 727-28, paras. 81, 92; see also 47 C.F.R. § 54.315(b)(5).

²¹ See ETC Certificate for RHMD, LLC, State of Georgia Public Service Commission, Docket No. 43877 (filed May 17, 2021) (RHMD ETC Application), available at <https://psc.ga.gov/search/telecom-detail/?certificateId=7830> (last visited March 15, 2022).

²² *Id.*

²³ See, e.g., Georgia Governor's Office, “Gov. Kemp Announces Almost \$408 Million in Awards to Provide Broadband Access,” (Feb. 1, 2022), available at <https://gov.georgia.gov/press-releases/2022-02-01/gov-kemp-announces-almost-408-million-awards-provide-broadband-access>.

²⁴ 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).

9. For these reasons, we find that RHMD has failed to present special circumstances that warrant a waiver of the requirement to demonstrate it obtained the necessary ETC designation by the June 7, 2021 deadline established by the Commission, and we find that granting such a waiver would not serve the public interest. Consequently, we deny the waiver and will release a public notice in the near future announcing RHMD in default on its bids in Georgia.²⁵ 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.²⁶

IV. ORDERING CLAUSES

10. 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.

11. IT IS FURTHER ORDERED that the petition for waiver of the deadline for providing documentation of ETC designation for Auction 904 filed by RHMD, LLC IS DENIED.

12. 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

Trent B. Harkrader
Chief
Wireline Competition Bureau

²⁵ 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.").

²⁶ *Rural Digital Opportunity Fund Order* at 735-36, paras. 114-17 ("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 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.").