

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

In the Matter of)
)
Petition of AT&T Mobility Spectrum LLC for) WT Docket No. 16-335
Waiver of Lower 700 MHz Band Interim and End-)
of-Term Geographic Construction Benchmarks for)
Alaska B Block License WQIZ358)

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 2018

Released: March 5, 2018

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny an application for review, filed by the Rural Wireless Association, Inc. (RWA),¹ of a Wireless Telecommunications Bureau (Bureau) Mobility Division (Division) *Order*.² In that *Order*, the Division granted AT&T Mobility Spectrum LLC (AT&T) a conditional waiver of Section 27.14(g) of the Commission's rules³ which, absent the waiver, would have required AT&T to serve 35 percent of the geographic area of Cellular Market Area (CMA) 315 in Alaska (Alaska 1-Wade Hampton) by December 13, 2016, or have its end-of-license term and related 70 percent geographic-area construction requirement accelerated by two years, to June 13, 2017, for AT&T's 700 MHz B Block License, WQIZ358 (the License). In light of the combination of factors in this case set forth below, we find that RWA has failed to demonstrate that the *Order* warrants review under Section 1.115 of the Commission's rules.⁴ We affirm and amplify the Division's finding that strict application of Section 27.14(g)(1) here would frustrate the rule's underlying purpose and that grant of the conditional waiver will serve the public interest, including by facilitating the introduction of wireless broadband services in CMA315, all of which is rural area in the interior and northern reaches of Alaska. We likewise affirm and amplify the Division's finding that strict application of Section 27.14(g)(1) would be contrary to the public interest in this case, given the unique challenges of serving this rural Alaska CMA—including challenges that the Commission has broadly recognized in other contexts concerning Alaska.⁵

¹ Application for Review of the Rural Wireless Association, Inc., WT Docket No. 16-335 (filed Feb. 17, 2017) (Application for Review). RWA is a trade association representing rural wireless carriers that each serve fewer than 100,000 subscribers. See Rural Wireless Association, About Us, <http://ruralwireless.org/about-rwa/>.

² See *AT&T Request for Waiver of Section 27.14(g)*, Letter Order, 32 FCC Rcd 512 (WTB Mobility Div. 2017) (*Waiver Order*).

³ 47 CFR § 27.14(g).

⁴ 47 CFR § 1.115.

⁵ See, e.g., *Connect America Fund; Universal Service Reform – Mobility Fund; Connect America Fund - Alaska Plan*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 10139, 10162, para. 72 (2016) (*Alaska Plan*) (citing *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17829, para. 507 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom.* Direct Communications Cedar Valley, LLC, et al., 753 F.3d 1015 (10th Cir. 2014)).

2. Although we deny RWA's Application for Review, we grant its separate request that AT&T be required to file a construction notification, as described below, demonstrating its population coverage for the License area as of June 13, 2017.⁶ As explained further below, if AT&T fails to satisfy any performance condition under the waiver, it would only retain the geographic portion of the License area it served as of June 13, 2017 (the end of term for the License absent the waiver). We are requiring AT&T to file the construction notification within 30 days of release of this *Memorandum Opinion and Order* to ensure that interested parties and staff are able to ascertain those portions of the License area that AT&T would retain should it not meet a performance condition.⁷

II. BACKGROUND

3. *Section 27.14(g)(1)*. In the *700 MHz Second Report and Order*, the Commission adopted interim and end-of-license term construction benchmarks for certain 700 MHz band licensees.⁸ The Commission required Lower 700 MHz band A and B Block licensees to provide signal coverage and offer service over at least 35 percent of their license area by June 13, 2013,⁹ later extended to December 13, 2016¹⁰ (Interim Construction Requirement), and to provide signal coverage and offer service over at least 70 percent of that area by the end of their initial 10-year license term, here June 13, 2019 (Final Construction Requirement).¹¹ Section 27.14(g)(1) provides that, if a licensee does not satisfy the Interim Construction Requirement of 35 percent, its license term will be reduced by two years, thereby requiring it to meet the Final Construction Requirement of 70 percent two years sooner.¹² Further, if a licensee does not meet its Final Construction Requirement (whether or not accelerated) as required by Section 27.14(g)(1), it will be subject to a "keep-what-you-serve" rule under Section 27.14(g)(2), whereby its "authorization will terminate automatically without Commission action for those geographic portions of its license in which the licensee is not providing service, and those unserved areas will become available for reassignment by the Commission."¹³

⁶ See *Ex Parte* Letter from Caressa D. Bennet, General Counsel, RWA (Bennet), to Marlene H. Dortch, Secretary, FCC (FCC Secretary Dortch), WT Docket No. 16-335 (filed July 17, 2017) (RWA Clarification Request). RWA directed this request to the Bureau during the pendency of its Application for Review. See *id.* at 2. The Division referred this request to the Commission for action. See 47 CFR § 1.106(a)(1).

⁷ Given that AT&T's existing waiver contains a condition that AT&T would retain only the geographic portion of the License area it served as of June 13, 2017 if AT&T fails to satisfy any performance condition, AT&T already must have retained this coverage information to truthfully and accurately demonstrate its coverage to the Commission as of that date when needed. We note that any Form 601 filing is made subject to the following statement: "Willful false statements made on this form or any attachments are punishable by fine and/or imprisonment (US Code, Title 18, § 1001) and/or revocation of any station license or construction permit (US Code, Title 47, § 312(a)(1)), and/or forfeiture (U.S. Code, Title 47, § 503)." The application also includes the following certification: "The Applicant certifies that all statements made in this application and in the exhibits, attachments, or documents incorporated by reference are material, are part of this application, and are true, complete, correct, and made in good faith."

⁸ See *Service Rules for 698-746, 747-762, and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289 (2007) (*700 MHz Second Report and Order*), upheld on reconsideration, *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Memorandum Opinion and Order on Reconsideration, 28 FCC Rcd 2671 (2013) (*700 MHz Reconsideration Order*).

⁹ See 47 CFR § 27.14(g).

¹⁰ See *Promoting Interoperability in the 700 MHz Commercial Spectrum*, Report and Order and Order of Proposed Modification, 28 FCC Rcd 15122, 15151-52, para. 64 (2013).

¹¹ See 47 CFR § 27.14(g); see also *700 MHz Second Report and Order*, 22 FCC Rcd at 15293-94, 15349, paras. 6, 157.

¹² 47 CFR § 27.14(g)(1).

¹³ 47 CFR § 27.14(g)(2). See also *700 MHz Second Report and Order*, 22 FCC Rcd at 15348, 15349, para. 153.

4. *AT&T's Waiver Request.* On October 11, 2016, AT&T requested a waiver of Section 22.14(g)(1) (Waiver Request), proposing alternative construction benchmarks based on population instead of geographic area; it also proposed related commitments for the License.¹⁴ The License area (CMA315) covers more than 376,863 square miles in Alaska.¹⁵ Subsequent to the release of a public notice seeking comment on the Waiver Request on October 14, 2016,¹⁶ AT&T filed two *ex parte* letters proposing the following more stringent, population-based construction benchmarks for the License:¹⁷

- By December 13, 2016, provide coverage and offer service to at least 70 percent of CMA315's population. Failure to meet this benchmark would result in a two-year reduction of the license term, accelerating the Final Construction Requirement to June 13, 2017.
- By June 13, 2019, provide coverage and offer service to at least 75 percent of CMA315's population. Failure to meet this benchmark would result in the automatic termination of any portions of CMA315 where AT&T was not providing service by June 13, 2017.
- By June 13, 2020, provide coverage and offer service to at least 80 percent of CMA315's population. Failure to meet this benchmark would result in the automatic termination of any portions of CMA315 where AT&T was not providing service by June 13, 2017.

5. AT&T also committed to maintaining coverage and service to at least 80 percent of CMA315's population for five years from the proposed June 13, 2020, benchmark (*i.e.*, through June 13, 2025).¹⁸ AT&T proposed that, in the event it fails to maintain coverage during the five-year period for a reason not beyond its control, its authorization would automatically terminate for those geographic portions of CMA315 where AT&T was not providing service by June 13, 2017.¹⁹ AT&T further stated that, during any renewal term, it would negotiate in good faith with any third party seeking to lease spectrum in an area not served by AT&T.²⁰

6. One party, General Communication, Inc. (GCI), timely filed comments during the pleading cycle, supporting the Waiver Request and arguing that rigid application of Section 22.14(g)'s geographic construction requirements to the License would frustrate its underlying purpose of promoting access to spectrum and the provision of service, especially in rural areas.²¹ On January 3, 2017, RWA filed Comments in which it opposed both a similar pending waiver request filed by GCI on behalf of its wholly-owned subsidiary The Alaska Wireless Network, LLC (AWN) (in WTB Docket No. 16-402), and

¹⁴ Request for Waiver of Lower 700 MHz Band Interim and End-of-Term Geographic Construction Benchmarks for Alaska B Block License WQIZ358, ULS File No. 0007499041 (filed Oct. 11, 2016) (Waiver Request). Specifically, AT&T proposed that it be permitted to satisfy the Interim Construction Requirement by covering 40 percent of CMA315's population by December 13, 2016, and the Final Construction Benchmark by covering 70 percent of CMA315's population by June 13, 2019. *See id.* at 3.

¹⁵ AT&T acquired the License in September 2014 from AlasConnect, Inc., the original licensee.

¹⁶ *See Wireless Telecommunications Bureau Seeks Comment on AT&T Request for Waiver of Geographic Coverage Requirement for 700 MHz License in Alaska*, Public Notice, 31 FCC Rcd 11640 (WTB Mobility Div. 2016).

¹⁷ *Ex Parte* Letter from Celia Nogales, AVP-Federal Regulatory, AT&T (Nogales), to FCC Secretary Dortch, WT Docket No. 16-335, at 1-2 (filed Dec. 2, 2016) (AT&T Dec. 2 *Ex Parte*); *Ex Parte* Letter from Nogales to FCC Secretary Dortch, WT Docket No. 16-335, at 1-2 (filed Dec. 22, 2016) (AT&T Dec. 22 *Ex Parte*).

¹⁸ AT&T Dec. 22 *Ex Parte* at 2.

¹⁹ *Id.* at 1-2. *See also* AT&T Dec. 2 *Ex Parte* at 2.

²⁰ *See* AT&T Dec. 2 *Ex Parte* at 2.

²¹ *See* General Communication, Inc. Reply Comments (GCI Reply Comments). *See also Ex Parte* Letter from Paul Margie, Counsel to GCI, to FCC Secretary Dortch, WT Docket No. 16-335 (filed Dec. 7, 2016).

AT&T's Waiver Request in the instant docket.²² While its arguments focused on the Awn Waiver Request, RWA contended that "the same justifications exist for denying the AT&T Waiver as exist for denying the [AWN Waiver Request]."²³ RWA argued that granting AT&T's Waiver Request would not serve the public interest, would undermine the purpose of Section 27.14(g) to prevent spectrum warehousing, and would foreclose other providers from using the spectrum to serve portions of the License area unserved by AT&T.²⁴ It also argued that harsh conditions and low population densities in Alaska do not warrant waiver relief under Section 1.925.²⁵ In response, AT&T asserted that the Division should not consider the RWA Comments because they were not filed during the pleading cycle established in this docket, and because they failed to address the specifics of AT&T's Waiver Request.²⁶ The Division considered the RWA Comments in this proceeding in the interest of having a more complete record.²⁷

7. *Waiver Order.* In its January 18, 2017 *Waiver Order*, the Division found that granting AT&T a waiver of Section 27.14(g) pursuant to Section 1.925(b)(3)(i) and (ii)²⁸ would "serve the public interest by fostering AT&T's provision of new and advanced wireless services to citizens in the interior and northern reaches of Alaska," and that strict application of Section 27.14(g) would frustrate its underlying purpose.²⁹ The Division found unique circumstances applicable to the License subject to the Waiver Request. Specifically, the Division noted the challenges of serving Alaska, "including its vast size, lack of backhaul and other infrastructure, its sparse population distribution, and difficult geographic and weather conditions (temperatures often fall below zero for long periods during the winter months in much of the License area)"³⁰ The Division also observed the entirely rural nature of the area covered by the License subject to the Waiver Request and how Alaska "ranks last in the United States for access to broadband service with a speed greater than 25 Mbps."³¹ The Division concluded that it would be "impracticable to meet the applicable geographic construction requirements."³²

8. To ensure that the public interest benefits of the waiver would be realized by citizens in isolated areas of CMA315, the Division required that AT&T provide coverage and offer service to: (1) at least 70 percent of CMA315's population by the December 13, 2016, Interim Construction Benchmark

²² RWA Comments, WT Docket Nos. 16-402 and 16-335 (Jan. 3, 2017) (RWA Comments). Awn, through GCI, filed its waiver request for its Lower 700 MHz A Block license WQJU656 (Basic Economic Area 171—Anchorage, AK), on Dec. 7, 2016 (AWN Waiver Request), and the Division granted it on June 6, 2017. *See The Alaska Wireless Network, LLC, Request for Waiver of Section 27.14(g)*, WT Docket No. 16-402, Letter Order, 32 FCC Rcd 4728 (WTB Mobility Div. 2017) (*AWN Waiver Order*).

²³ RWA Comments at 2, n.4.

²⁴ *Id.* at 3-5.

²⁵ *Id.* at 6.

²⁶ *See Ex Parte* Letter from Nogales to FCC Secretary Dortch, WT Docket No. 16-335, at 1 (filed Jan. 13, 2017).

²⁷ *Waiver Order*, 32 FCC Rcd at 514 (treating the RWA Comments as an informal request for Commission action under 47 CFR § 1.41 of the Commission's rules).

²⁸ A waiver is appropriate under Section 1.925(b)(3) if the request meets the criteria under either subsection (i) or the criteria under subsection (ii). Here the Division supported its decisions with two independent sets of factual findings, *i.e.*, that the waiver request satisfied each prong of the applicable rule. *See Waiver Order*, 32 FCC Rcd at 514 (citing 47 C.F.R. § 1.925(b)(3)). To the extent necessary, we clarify that reliance on either of these findings would support affirming that grant.

²⁹ *Waiver Order*, 32 FCC Rcd at 512, 514.

³⁰ *Id.*, 32 FCC Rcd at 515 (citations omitted).

³¹ *Id.*

³² *Id.*

deadline; (2) at least 75 percent of CMA315's population by June 13, 2019, the end-of-license term construction deadline; and (3) at least 80 percent of CMA315's population by June 13, 2020.³³ The Division also required AT&T to maintain the 80 percent coverage level until at least June 13, 2025,³⁴ and to negotiate in good faith with any third party seeking to acquire or lease spectrum in an area not served by AT&T in CMA315.³⁵ The Division ordered that, in the event AT&T fails to satisfy any of these performance conditions, its authorization for the License will automatically terminate, without Commission action, for those geographic portions of the License area in which AT&T was not providing service by June 13, 2017—the accelerated end-of-license term for the License absent the Division's waiver of Section 27.14(g).³⁶

9. *Application for Review.* On February 17, 2017, RWA filed its Application for Review, arguing that the *Waiver Order* does not meet the waiver standard under either Section 1.925(b)(3)(i) or Section 1.925(b)(3)(ii) and should be overturned.³⁷ Reiterating that the purpose of Section 27.14(g) is to prevent spectrum warehousing, RWA argues that the *Waiver Order* undermines that purpose by “allowing AT&T to retain the exclusive right to serve the approximately 90 percent of the geographic area of CMA315 that remains unserved more than eight years after the license was granted” and “will in all likelihood remain unserved even if all the conditions set forth in the [*Waiver Order*] are met.”³⁸ Therefore, RWA contends, the *Waiver Order* fails under Section 1.925(b)(3)(i). RWA notes that the Commission specifically rejected population-based benchmarks for the CMA licenses in this band, finding population-based benchmarks suitable only for larger Regional Economic Area Group (REAG) licenses.³⁹ It adds that the reasoning underlying the Commission's adoption of population-based benchmarks for the Upper 700 MHz C and C1 Blocks—“to be licensed on a far larger [REAG] basis to encourage the development of new nationwide and/or regional services”—does not apply in this case. It notes that AT&T is neither a new service provider nor rolling out a nationwide service using this License, and that CMA315 “represents less than one-half of the territory of REAG 7, which comprises the entire State of Alaska.”⁴⁰ According to RWA, the Commission's decision to adopt Section 27.14(g)'s “keep-what-you-use” rule took into account the fact that certain CMAs, such as CMA315, might still be too large or challenging for a single operator, and the rule “ensures that spectrum can be put to use in unserved areas by providers other than the licensee.”⁴¹

10. RWA also argues that the *Waiver Order* fails under Section 1.925(b)(3)(ii) because, while “Alaska is large, rural, low density, and subject to weather extremes, it is not entirely unique in this regard,” and the Commission declined to adopt special build-out provisions for Alaska and other areas that present similar challenges.⁴² Moreover, RWA contends, AT&T does not need the waiver relief to expand service within CMA315, as it could reacquire spectrum relinquished in CMA315 for reassignment under Section 22.14(j)(2)—after giving third-party providers a 30-day window to apply first—if the “keep

³³ *Id.*, 32 FCC Rcd at 517.

³⁴ *Id.*, 32 FCC Rcd at 517-18.

³⁵ *Id.*, 32 FCC Rcd at 518.

³⁶ *Id.*, 32 FCC Rcd at 517.

³⁷ See Application for Review at 4.

³⁸ *Id.* at 5, 8.

³⁹ *Id.* at 7.

⁴⁰ *Id.*

⁴¹ *Id.* at 8-10.

⁴² *Id.* at 10.

what you use” rule is enforced.⁴³ Regarding the *Waiver Order*’s condition that AT&T must engage in good faith negotiations with any third party that seeks to serve an unserved area of CMA315, RWA argues that it rewards AT&T for not meeting its build-out obligations while harming third parties, as the burdens of serving Alaska “would be magnified when faced by third party providers that would be required to expend not only the capital costs to provide service to sparsely populated unserved areas, but also incur the expense to acquire spectrum rights from AT&T and pay AT&T to lease spectrum.”⁴⁴ According to RWA, this harm is compounded because negotiations with AT&T “would invariably drag on for months with no guarantee that an agreement would ever be forthcoming,” delaying service to the area by potential third-party providers and imposing additional expenses on them prior to any offering of service.⁴⁵

11. On March 6, 2017, AT&T filed an opposition to the Application for Review, highlighting key points of the Division’s *Waiver Order* and endorsing the Division’s conclusions as to why the requested waiver relief is warranted.⁴⁶ Responding to RWA’s argument that the Commission specifically declined to adopt population-based benchmarks for Lower 700 MHz markets such as CMA315, AT&T asserts that CMA315 is a “large geographic area with logistical challenges and, for the most part, a lack of existing infrastructure that requires a significant capital investment to build-out,” and is thereby more like REAGs as described in the *700 MHz Second Report and Order*, where the Commission did adopt population-based benchmarks.⁴⁷ Thus, AT&T contends, “CMA315 is exactly the type of license that the Commission considered conducive to population-based benchmarks.”⁴⁸ Disputing RWA’s claims that the *Waiver Order* does not satisfy Section 1.925(b)(3)(ii), AT&T argues that the combination of factors in CMA315 is unique, and that strictly enforcing Section 27.14(g)’s geographic benchmarks and the resulting two-year reduction in the license term would be inequitable.⁴⁹ AT&T states that it has “steadily expanded service in CMA315 since its acquisition” of the License, and it adds that it has met the interim geographic coverage benchmarks for the other three Lower 700 MHz B Block licenses it holds in Alaska.⁵⁰ Hence, it asserts, RWA’s concern about warehousing by AT&T “certainly does not fit.”⁵¹

12. On March 16, 2017, RWA filed a reply to AT&T’s Opposition, which largely reiterated the arguments in its Application for Review and emphasized its contention that the public interest is not served by the waiver.⁵² Noting that the buildout policy established for 700 MHz spectrum at issue here constitutes a new, less harsh approach compared to license forfeiture for failing to meet buildout deadlines, RWA argues that, by granting AT&T waiver relief, the Bureau has not given the policy a

⁴³ See *id.* at 10-11 (citing 47 CFR § 27.14(j)(2)).

⁴⁴ *Id.* at 13.

⁴⁵ *Id.* at 12-14 (also asserting, at 12, that the negotiation condition is a “clumsy attempt to backfill the deficiencies in the Bureau’s waiver analysis,” and that a “requirement to negotiate in good faith is not the same as requiring a party to make a deal” and can thus carry its own difficulties) (citing *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327 (2015)).

⁴⁶ See AT&T Opposition at 4 (citing *Waiver Order*, 32 FCC Rcd at 516).

⁴⁷ *Id.* at 6 (citing *700 MHz Second Report and Order*, 22 FCC Rcd at 15351, para. 164).

⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 8.

⁵⁰ *Id.* at 8-9. AT&T also holds licenses for WQIZ597 (CMA316 Alaska 2-Bethel), WQIZ598 (CMA317 Alaska 3-Haines), and WQJU565 (CMA187 Anchorage, AK) and states (*see id.*) that AT&T’s performance in these markets “belies any argument that AT&T is using the unique situation in Alaska to warehouse spectrum.”

⁵¹ *Id.* at 8.

⁵² RWA Reply to Opposition, WT Docket No. 16-335 (filed March 16, 2017) (RWA Reply).

chance to work as designed in CMA315.⁵³ RWA distinguishes and dismisses as inapposite AT&T's reliance on certain Commission precedents concerning buildout requirements for the broadband Personal Communications Service where, RWA notes, the penalty for failure to meet construction benchmarks is forfeiture of the entire license, and for the Cellular Service where, RWA observes, a one-year build-out period normally applies.⁵⁴ AT&T should not, RWA contends, be allowed to "pick and choose from among buildout options that it likes best."⁵⁵

III. DISCUSSION

13. We begin with an important premise. As with requests to waive other Commission rules, requests to waive the requirements of the wireless construction rules must "meet a high hurdle at the starting gate."⁵⁶ In determining whether that standard is met, we must evaluate each case based on the specific circumstances that it presents. Under Section 1.925(b)(3)(i) of the Commission's rules, the Commission may grant a rule waiver when the following two requirements are satisfied: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and (2) a grant of the requested waiver would be in the public interest.⁵⁷ Under Section 1.925(b)(3)(ii) of the Commission's rules, the Commission may grant a rule waiver when, in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁵⁸ As discussed below, we deny RWA's Application for Review and affirm the conditional waiver grant. Although a waiver applicant need only satisfy either Section 1.925(b)(3)(i) *or* (ii), here, based on our review of the entire record, we are persuaded that the specific circumstances of this case support the conditional grant of a waiver and a finding that AT&T has satisfied the requirements of both Sections 1.925(b)(3)(i) and (ii), as independent bases to support the decision to grant the waiver. As discussed below, the circumstances specific to this case include: the License area's vastness, lack of backhaul and other infrastructure, extreme climate conditions (with a significant portion of the area lying within the Arctic Circle), sparse population, rural area, and extremely limited availability of high speed broadband services compared to other parts of the country.

14. It is well-established that the Commission may waive a rule where the particular facts make strict compliance inconsistent with the public interest,⁵⁹ and it may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁶⁰ In the *700 MHz Second Report and Order*, the Commission, addressing the type of License subject to this Waiver Request, did not foreclose the granting of waivers in particular cases that satisfy the FCC's waiver rules. Rather, the Commission anticipated that the type of waiver that AT&T sought might be necessary

⁵³ *Id.* at i, 11. RWA argues that, by enforcing the rule, "the FCC will make vast unserved area in CMA315 available for all competing service providers, including AT&T." *Id.* at 4.

⁵⁴ *Id.* at 6-8 (citing AT&T Opposition at 5-6, which in turn cites *Amendment of the Commission's Rules To Establish New Personal Communications Services*, Gen Docket No. 90-314, Memorandum Opinion and Order, 9 FCC Rcd 4957, 5019 (1994)). See *id.* at 9-10 (citing AT&T Opposition at 6, which in turn cites *Request for Waiver and Extension of Time To Construct Ten Cellular Locations – KTKR318*, Letter Order, 22 FCC Rcd 16273 (WTB Mobility Div. 2007)).

⁵⁵ RWA Reply at ii, 11.

⁵⁶ See *WAIT Radio v. FCC*, 459 F.2d 1203, 1207 (D.C. Cir. 1972).

⁵⁷ 47 CFR § 1.925(b)(3)(i).

⁵⁸ 47 CFR § 1.925(b)(3)(ii).

⁵⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

⁶⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio I*); *Northeast Cellular*, 897 F.2d at 1166.

in certain factual circumstances for the Lower 700 MHz band.⁶¹ In fact, in the *700 MHz Reconsideration Order*, the Commission explained that “[f]or specific cases of hardship . . . providers can seek waiver relief” related to their construction obligations.⁶² The Commission explained that “requests must be well founded and not based solely on grounds of low population density,” and it directed staff to “consider these types of requests on a case-by-case basis,” as the Division did in this proceeding.⁶³

15. Turning to the merits, we find that the circumstances of this case support affirming the Division’s conditional grant of the Waiver Request under either Section 1.925(b)(3)(i) or under Section 1.925(b)(3)(ii) of the Commission’s rules. As discussed below, we have carefully reviewed the record before us and are not persuaded by RWA’s arguments that the Division’s grant of relief to AT&T “conflict[s] with FCC regulation, past precedent, and public policy” or that it “establishes a harmful precedent which should be overturned.”⁶⁴ Rather, in the context of the unique circumstances⁶⁵ and the public interest considerations presented, the Division’s grant of conditional waiver relief accords with applicable law and policy, and promotes Section 27.14(g)’s core purpose, namely, to foster the provision of new wireless services, especially in remote areas.

16. *Section 1.925(b)(3)(i)*. We reject RWA’s claims that the Division ignored Section 27.14(g)(1)’s core purpose in granting the waiver under Section 1.925(b)(3)(i).⁶⁶ As noted above, RWA argues that the purpose of Section 27.14(g) is to prevent spectrum warehousing, and that the *Waiver Order* undermines that purpose by allowing AT&T to retain the entire License area with limited geographic coverage.⁶⁷ While we do not disagree that one policy underpinning Section 27.14(g) is to discourage spectrum warehousing, it is not the only policy the Commission sought to advance in adopting this rule. Rather, in the *700 MHz Second Report and Order*, the Commission stated that Section 27.14(g)’s underlying purpose is “to better promote access to spectrum and the provision of service, especially in rural areas.”⁶⁸ The Commission explained that Section 27.14(g)’s performance requirements “will provide all licensees with incentives to serve more rural communities” and “are the most effective way to promote rapid service to the public, *especially in rural areas*.”⁶⁹

17. We concur with the Division that the relief granted in the *Waiver Order* furthers Section 27.14(g)’s purpose in the specific circumstances here by enabling AT&T to bring new advanced wireless services to Alaskans living in remote areas of CMA315 that they might not receive absent the requested waiver.⁷⁰ It is an understatement to say that all of CMA315 is rural. While the Commission defines a rural county as one with a population density of 100 persons or less per square mile, the Division explained that “[s]ix of the seven boroughs (the equivalent of counties) comprising CMA315 have a population density of less than half a person per square mile; the other has a density of 13 persons per

⁶¹ *700 MHz Second Report and Order*, 22 FCC Rcd at 15348, para. 153.

⁶² *700 MHz Reconsideration Order*, 28 FCC Rcd at 2674, para. 6.

⁶³ *Id.*, 28 FCC Rcd at 2675, para. 9.

⁶⁴ Application for Review at 2.

⁶⁵ We emphasize that we find a waiver is appropriate here based on the totality of the factors specific to this case.

⁶⁶ Application for Review at 4-5. *See also* RWA Reply at 2, 3.

⁶⁷ Application for Review at 5, 8; RWA Reply at 12-13.

⁶⁸ *700 MHz Second Report and Order*, 22 FCC Rcd at 15348, para. 153.

⁶⁹ *Id.*, 22 FCC Rcd at 15349, para. 155 (emphasis added).

⁷⁰ *Waiver Order*, 32 FCC Rcd at 516. We also note that the Division properly relied on Section 309 of the Communications Act of 1934, as amended (the Act) to support the waiver grant. *See Waiver Order*, 32 FCC Rcd at 516. Section 309 directs the Commission to ensure “the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas.” 47 U.S.C. § 309(j)(3).

square mile.”⁷¹

18. We also agree with the Division’s finding that service in the License area, particularly to those Alaskans living in the remote areas of CMA315, could be delayed absent a waiver with appropriate conditions, and that Section 27.14(g)’s purpose to promote access to spectrum and the provision of service, especially in rural areas, would be frustrated by strict application of the rule to AT&T under the circumstances here.⁷² The Division’s *Waiver Order* requires AT&T to have provided coverage and offer service to at least 70 percent of CMA315’s population by the December 13, 2016, interim construction deadline,⁷³ which is 30 percentage points higher than the 40 percent interim population benchmarks for the Lower 700 MHz E Block⁷⁴ and Upper C Block.⁷⁵ We acknowledge that these are not the standards applicable to AT&T’s License and do not intend for licensees to be able to “cherry pick” which buildout standards should apply to them.⁷⁶ Rather, we refer to these standards by analogy to support the finding that grant of a waiver with the conditions described above would lead to improved coverage for consumers, given the special challenges associated with building here, thereby supporting a finding that grant of the waiver in this instance would serve the public interest. When AT&T filed its required notification on December 27, 2016, it stated that it had satisfied the 70 percent population coverage condition.⁷⁷ The *Waiver Order* requires AT&T to provide coverage and offer service to at least 80 percent of CMA315’s population by June 13, 2020,⁷⁸ a benchmark 10 percentage points higher than the 70 percent population benchmark required for the Lower 700 MHz E Block,⁷⁹ and a higher population-based benchmark than required in any other commercial service.⁸⁰ The *Waiver Order* further requires AT&T to maintain this 80 percent coverage until at least June 13, 2025.⁸¹ If AT&T fails to meet any of these benchmarks, its authorization for the License will automatically terminate, without Commission action, for those geographic portions of the License area in which AT&T was not providing service by June 13, 2017—the accelerated end-of-license term for the License absent the Division’s waiver of Section 27.14(g). AT&T would in that case retain only what it had built as of June 13, 2017.⁸² The construction notification that we are requiring AT&T to file herein, as discussed below, will confirm the extent to which AT&T built by June 13, 2017, consistent with the terms of the *Waiver Order*.

⁷¹ *Waiver Order*, 32 FCC Rcd at 515.

⁷² *Id.*, 32 FCC Rcd at 516.

⁷³ *Id.*, 32 FCC Rcd at 517.

⁷⁴ See *Interoperability Order*, 28 FCC Rcd at 15148, para. 57 (all active Lower 700 MHz band E Block licensees may meet their interim construction benchmark by providing signal coverage and offering service to at least 40 percent of its total E Block population.).

⁷⁵ See 47 CFR § 27.14(h) (Upper 700 MHz C Block licensees are required to provide reliable service sufficient to cover 40 percent of the population of their license areas within four years.).

⁷⁶ As discussed above, RWA distinguishes and dismisses as inapposite AT&T’s reliance on certain Commission precedents concerning buildout requirements for other services and argues that AT&T should not be allowed to choose from among buildout options that it likes best. See RWA Reply at ii, 6-10 (citations omitted), 11.

⁷⁷ See AT&T Notification of Construction, Exhibit—Pops Coverage, ULS File No. 0007602932; *Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing*, Public Notice, Rep. No. 11963 (rel. Jan. 4, 2017).

⁷⁸ *Waiver Order*, 32 FCC Rcd at 517.

⁷⁹ *Id.*, 32 FCC Rcd at 516. See also 47 CFR § 27.14(h) (Upper 700 MHz C Block licensees are required to provide reliable service sufficient to cover 75 percent of the population within ten years).

⁸⁰ See, e.g., 47 CFR §§ 24.203 (PCS), 27.14(s) (AWS-1).

⁸¹ *Waiver Order*, 32 FCC Rcd at 517-18.

⁸² *Id.*, 32 FCC Rcd at 517.

19. We reject RWA's contention that, because the Commission adopted geographic-based benchmarks for Lower A and B Block licenses—which are based on Economic Areas (EAs) and CMAs, rather than on generally larger REAGs—the rule's underlying purpose is undermined by the Division's decision permitting AT&T to use population-based benchmarks for CMA315.⁸³ The Commission, in the *700 MHz Second Report and Order*, emphasized that it was creating licenses in the Lower 700 MHz A and B Block “based on *smaller geographic service areas*, which would be more readily available to providers that tend to serve rural consumers,” and that the “keep-what-you-serve” allowed for the creation of even smaller areas.⁸⁴ Given the considerations identified here, we consider waiving the applicable buildout requirements with the specified conditions instead to lead to an outcome comparable to that which the Commission envisioned for these other types of licenses.⁸⁵ Commission records show that the average size of a CMA in the United States is approximately 5,526 square miles, while the average size of a REAG is about 337,993 square miles.⁸⁶ AT&T's CMA License area, however, is larger than eight of the 12 REAGs, as the Division observed.⁸⁷ RWA also contends that the Division essentially has allowed AT&T to use the waiver process “to pick and choose from among buildout options [it] like[s] the best” in contravention of the benchmark the Commission explicitly selected.⁸⁸ While we reemphasize that our waiver process is not one to be taken lightly, and, as stated above, we do not intend for licensees to be able to “cherry pick” which buildout standards should apply to them, we reiterate that the Commission's waiver rules, and the *700 MHz Reconsideration Order* specifically, provide for this type of waiver in appropriate circumstances, which we find are met here.

20. In its Application for Review, RWA for the first time challenged the imposition of the requirement that AT&T negotiate in good faith with any third party seeking to acquire or lease spectrum in a geographic area of CMA315 not served by AT&T.⁸⁹ While RWA may now consider this condition to be of little value, RWA's comments about the availability of good faith negotiation opportunities do not in any way undercut our approval of the waiver relief granted by the Division. We have required good faith negotiations in many contexts,⁹⁰ and we stand ready to enforce this condition should any entity seeking to negotiate with AT&T for access to unserved area in CMA315 encounter what appears to be negotiations that are anything less than “in good faith.” To the extent that even negotiations conducted in good faith do not guarantee that an RWA member will be able to use the spectrum to supply service, the same would hold true of re-auctioning the spectrum, which is the outcome that RWA members seek in urging us to overturn this waiver. For these reasons, we reject RWA's argument.

⁸³ Application for Review at 6-7; RWA Reply at 11-12.

⁸⁴ *700 MHz Second Report and Order*, 22 FCC Rcd at 15348-49, paras. 155-56 (emphasis added).

⁸⁵ See *700 MHz Reconsideration Order*, 28 FCC Rcd at 2674, para. 6.

⁸⁶ See FCC's Geographic Information Systems Database, <https://www.fcc.gov/general/geographic-information-systems>.

⁸⁷ See FCC's Geographic Information Systems Database, <https://www.fcc.gov/general/geographic-information-systems>; FCC, Auctions, Maps, <http://wireless.fcc.gov/auctions/data/maps/REAG.pdf>.

⁸⁸ RWA Reply at 11.

⁸⁹ Application for Review at 13; see *Waiver Order*, 32 FCC Rcd at 518. AT&T had voluntarily committed in support of its Waiver Request to negotiate in good faith with any third party seeking to lease spectrum in any area not being served by AT&T. See AT&T Dec. 2 *Ex Parte* at 2. RWA did not challenge this commitment as being of little value in its Reply Comments.

⁹⁰ E.g., 47 CFR §§ 27.1216(b) (negotiations between BRS and grandfathered EBS licensees), 20.23(a) (negotiations regarding deployment of a Contraband Interdiction System in a correctional facility), 51.301(a), (b) (negotiations between an incumbent local exchange carrier and a requesting telecommunications carrier regarding interconnection and other specified agreements), 90.677 (800 MHz transition to separate cellular and non-cellular operations), and 101.73 (relocation of fixed service licensees from the AWS bands).

21. In the *Waiver Order*, the Division carefully considered the record before it and reasonably found that a waiver would “serve the public interest by fostering the provision of new wireless services to areas of Alaska that might otherwise continue to be underserved.”⁹¹ In weighing the public interest, the Division noted that “Alaska ranks last in the United States for access to broadband service with a speed greater than 25 Mbps” and correctly concluded that a waiver would facilitate AT&T’s provision of service to this underserved area.⁹² In addition, the Division appropriately considered that the relief granted in the *Waiver Order* would enable AT&T to continue to expand service to new, remote communities as they form over time and that this, too, would serve the public interest.⁹³

22. RWA contends that this public interest benefit is moot because AT&T can reapply for any license areas it loses pursuant to Section 27.14(g)(2)’s “keep-what-you-serve” rule once third parties have a chance to do so first.⁹⁴ As noted above, however, we agree with the Division that, absent a waiver with appropriate conditions, the provision of wireless services to Alaskans in CMA315, especially those residing in particularly remote areas, could be delayed, particularly in light of Alaska’s uniqueness, which we describe further below.⁹⁵ Serving the remote areas of CMA315—areas with extremely sparse population and a notable lack of existing infrastructure—requires a significant capital investment. AT&T can build upon its investments and experience in providing service to portions of CMA315’s population, and is thus positioned to quickly expand service to communities that might otherwise not receive service. The Division therefore appropriately concluded that, on balance, the relief granted with conditions in the *Waiver Order* serves the public interest in Alaska.

23. *Section 1.925(b)(3)(ii)*. In light of the License area’s vastness, lack of backhaul and other infrastructure, extreme climate conditions (with a significant portion of the area lying within the Arctic Circle), sparse population, rural area, and extremely limited availability of high speed broadband services compared to other parts of the country, we also agree with the Division’s findings that, “in view of the unique factual challenges of serving Alaska . . . , application of Section 27.14(g) here would be contrary to the public interest.”⁹⁶ While RWA “acknowledges that Alaska is large, rural, low density, and subject to weather extremes,” it contends that Alaska is not entirely unique in this regard.⁹⁷ We disagree. Alaska is indeed unique among other markets in the 700 MHz band. The challenges of bringing widespread service to Alaska are not present in any other state to the same degree, and, as the Division stated, “the many unique circumstances attendant to serving CMA315 . . . make it impracticable to meet the applicable geographic construction requirements.”⁹⁸

24. In the *Alaska Plan*, the Commission found that carriers in Alaska face unique conditions due to “its remoteness, lack of roads, challenges and costs associated with transporting fuel, lack of scalability per community, satellite and backhaul availability, extreme weather conditions, challenging topography, and short construction season.”⁹⁹ As the Division accurately noted, Alaska is by far the largest state by area, yet has the lowest population density of any state, and CMA315 itself covers more than 376,863 square miles, an area 28 percent larger than Texas, but with less than one percent of its

⁹¹ *Waiver Order*, 32 FCC Rcd at 516.

⁹² *Id.*, 32 FCC Rcd at 515.

⁹³ *See id.*, 32 FCC Rcd at 516.

⁹⁴ *See* Application for Review at 10; RWA Reply at 4-5.

⁹⁵ *See Waiver Order*, 32 FCC Rcd at 516.

⁹⁶ *See id.*, 32 FCC Rcd at 514.

⁹⁷ Application for Review at 10.

⁹⁸ *Waiver Order*, 32 FCC Rcd at 515.

⁹⁹ *See supra* note 5.

population.¹⁰⁰ Moreover, more than 44 percent of CMA315 is within the Arctic Circle, where the average winter temperature is -34° C (-30° F), and much of this area is inhabited by wild animals and can only be reached by aircraft or snowmobile in good weather.¹⁰¹ In view of that combination of unique circumstances, we agree with the Division that strict application of Section 27.14(g) would be contrary to the public interest. In addition, we find that the unique facts presented by AT&T fit within the ambit of “specific cases of hardship” envisioned by the Commission in the *700 MHz Reconsideration Order* as potential grounds for waiving construction requirements based on geographic benchmarks.¹⁰²

25. RWA argues that AT&T’s ability to regain lost portions of its license area pursuant to Section 27.14(j)(2) also weighs against a waiver grant under Section 1.925(b)(3)(ii) because “AT&T is in no way harmed or disadvantaged by application of the geographic construction benchmarks contained in Section 27.14(g).”¹⁰³ This concern is not controlling to our determination, however. Rather, our concern under Section 1.925(b)(3)(ii) is whether, in view of the unique factual circumstances present here, application of the rule would be contrary to the public interest.¹⁰⁴ With our focus on the public interest standard, we conclude that the Division correctly found that strict application of Section 27.14(g) would be contrary to the public interest for purposes of its analysis of the appropriateness of grant of a conditional waiver under Section 1.925(B)(3)(ii).

26. We now turn to RWA’s claims that the *Waiver Order* establishes a harmful precedent.¹⁰⁵ The tailored relief granted to AT&T does not undermine Section 27.14(g)(1) or any other Commission rule. As explained above, licensees must meet a high hurdle in seeking to obtain a waiver of our construction rules and, given the consequences of failing to meet that standard, the Commission has created appropriate incentives to comply with its buildout obligations. At the same time, it has long been the case that the Commission may waive a rule when it finds that the purpose of the rule is better served by another, more effective implementation of overall policy on an individual basis.¹⁰⁶ As to the License that is the subject of the instant Waiver Request, the Commission specifically envisioned that requests for waiver of Section 27.14(g)(1) would be considered case-by-case, as noted above. We conclude that a

¹⁰⁰ *Waiver Order*, 32 FCC Rcd at 515.

¹⁰¹ *Id.*

¹⁰² *700 MHz Reconsideration Order*, 28 FCC Rcd at 2674, para. 6. In a recent *ex parte* filing, RWA argues that the Division’s decision to deny a licensee’s request for a population-based alternative final benchmark for two Lower 700 MHz band licenses in American Samoa where, according to RWA, the buildout challenges are “virtually identical to those faced by AT&T” here, “mandate that RWA’s application for review be granted” in the instant case. *Ex Parte* Letter from Bennet to FCC Secretary Dortch, WT Docket No. 16-335, at 2 (filed Nov. 30, 2017) (citing *AST Telecom, LLC d/b/a Bluesky, Request for Waiver of Interim and Final Geographic Construction Benchmarks for Lower 700 MHz Band A and B Block Licenses WQJQ800 and WQOU674 in American Samoa*, ULS File Nos. 0007595216 and 0007597075, 32 FCC Rcd 9307 (WTB Mobility Div. 2017)). *See also id.* at 1 (asserting that the circumstances in the instant case are “far less compelling than those involved in the Bluesky decision”). RWA asserts that AT&T and Bluesky are similarly situated and that AT&T’s waiver request should be denied for the same reasons as the Bureau articulated in its decision to deny a waiver to Bluesky. In its effort to lump together Alaska and American Samoa for purposes of assessing requests for waiver of Section 27.14(g), RWA ignores a fundamental difference between the two areas: AT&T’s License Area is 376,863 square miles in contrast to Bluesky’s American Samoan license areas, which cover about 551 square miles. The challenges associated with buildout in this specific area within Alaska are therefore much more significant than the specific areas in American Samoa covered by the Bluesky licenses, and in that regard, AT&T and Bluesky are not similarly situated. A waiver is thus appropriate in the instant situation.

¹⁰³ Application for Review at 11.

¹⁰⁴ *See Waiver Order*, 32 FCC Rcd at 516.

¹⁰⁵ Application for Review at i, 2, 14.

¹⁰⁶ *WAIT Radio I*, 418 F.2d at 1159.

waiver is warranted under the totality of the circumstances presented, including those identified by the Division in the *Waiver Order*. We will continue to review any requests for waiver carefully considering the specific facts of each case, including the scope of the requested waiver.

27. *Construction Notification Requirement.* Finally, we address RWA's separate request, filed July 17, 2017, that AT&T be required to file a construction notification for the License area demonstrating its geographic coverage as of June 13, 2017.¹⁰⁷ We will treat RWA's request as an informal request for Commission action under Section 1.41 of our rules and grant it for the reasons that follow.¹⁰⁸

28. As RWA notes,¹⁰⁹ the Division's *Waiver Order* requires AT&T to satisfy performance conditions for the License, and if it fails to meet a relevant condition, it would only retain the geographic portion of the License area it served as of June 13, 2017 (the end of term for the License absent the Division's waiver of Section 27.14(g)(1)). RWA also notes that in the recent order granting AWN a conditional waiver of Section 27.14(g)(1) for a 700 MHz license covering the State of Alaska, the Division required AWN to submit a construction showing "so that the Bureau may determine AWN's served geographic portion as of June 13, 2017" in the event it fails to meet a waiver condition.¹¹⁰ RWA states that AT&T's "filing of system maps and shapefile data reflecting coverage *as of June 13, 2017*" is necessary so that interested parties would be able to determine the boundaries of AT&T's License area if it were to fail to meet a waiver condition.¹¹¹ We agree that such a condition would be appropriate here to ensure that interested parties and staff are able to ascertain the area of a License served as of June 13, 2017, should AT&T not fulfill a waiver condition. Accordingly, we hereby direct AT&T to file, within 30 days of this *Memorandum Opinion and Order's* release date, a construction notification for the License, demonstrating its geographic coverage area as of June 13, 2017.

IV. CONCLUSION AND ORDERING CLAUSES

29. In sum and for the above reasons, we find that the specific circumstances and public interest benefits present here support a conditional waiver of Section 27.14(g)(1). We therefore deny RWA's Application for Review. For the reasons stated above, however, we grant RWA's separate request that we require AT&T to file a construction notification demonstrating its geographic coverage for the License area as of June 13, 2017.

30. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 CFR § 1.115, the Application for Review filed by the Rural Wireless Association, Inc. on February 17, 2017, IS DENIED.

31. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.41, 1.106(a)(1), and 1.946(d) of the Commission's Rules, 47 CFR §§ 1.41, 1.106(a)(1), 1.946(d), the request of the Rural Wireless Association, Inc., filed on July 17, 2017, IS GRANTED and that within 30 days of this *Memorandum Opinion and Order's* release date, AT&T Mobility Spectrum LLC SHALL FILE a construction notification demonstrating its geographic coverage area as of June 13, 2017, for Call Sign WQIZ358.

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¹⁰⁷ See RWA Clarification Request at 2.

¹⁰⁸ 47 CFR § 1.41 ("requests for action may be submitted informally").

¹⁰⁹ See RWA Clarification Request at 1.

¹¹⁰ *Id.* at 2 (citing the *AWN Waiver Order*).

¹¹¹ *Id.* (emphasis in original).

Marlene H. Dortch
Secretary