

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

In the Matter of)	
)	
Petition of General Communication, Inc.)	
for Waiver of Lower 700 MHz Band)	
Interim and End-of-Term Geographic)	WT Docket No. 16-402
Construction Benchmarks for Alaska)	
A-Block License WQJU656)	

APPLICATION FOR REVIEW OF THE RURAL WIRELESS ASSOCIATION, INC.

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Table of Contents

	<u>Page No.</u>
SUMMARY	i
I. Summary of Facts	2
II. Question Presented for Review.....	5
III. Argument.....	5
A. The Waiver Letter Fails to Satisfy the Waiver Criteria of Section 1.925(b)(3)(i).....	6
B. Good Faith Negotiations Requirement Does Not Cure the Waiver Deficiencies.....	13
C. The Waiver Letter Fails to Satisfy the Waiver Criteria of Section 1.925(b)(3)(ii).....	14
IV. Conclusion	16

Summary

In reviewing the Bureau's decision to waive the geographic buildout obligations for AWN in BEA171 the Commission should ask itself two questions. First, what would be the impact on the public if the waiver were not granted? Second, and relatedly, would enforcement of the buildout requirements make it more likely or less likely that service will be made available to the more than 90 percent of the license territory that will remain unserved at the end of the license term? While the Bureau gives lip service to the criteria used to grant rule waivers, there is no factual or analytical support for the Bureau's assertions that a waiver is needed to expand service to rural areas or that enforcement of the Commission's buildout policy would delay service to rural areas.

Nor is the Bureau's attempt to base the waiver relief upon a finding of specific hardship supported by the record in this proceeding. The undisputed facts are that the license was allowed to lie fallow for seven and one-half years until AWN acquired the license and began construction a few short months before the buildout deadline. These facts do not support a finding of hardship that would justify a rule waiver.

The buildout policies at issue in this case represent a new approach, adopted specifically for the 700 MHz spectrum at issue here, that replaces the former harsh license forfeiture penalty for failing to meet buildout deadlines with a market-based approach that relies on competition. If a licensee fails to meet its end of term buildout obligations, only the unserved areas in its license territory are reclaimed by the Commission and all providers, including the original licensee, are eligible to apply to serve those areas. The Bureau is simply not in a position to conclude that waiver is necessary in this case to get service to the unbuilt areas of BEA171 because it has never given this new buildout policy a chance to work as designed. Without a waiver, AWN would remain free to continue expanding its service until the end of its license term. AWN would also remain free to apply to expand service in BEA171 that remained unserved at the end of its license term. The key is that other providers would be able to apply to serve those areas as well. The Bureau provides no plausible explanation why allowing AWN alone to provide service in the unbuilt areas of BEA171 would be more likely to expand service availability than enforcement of the buildout rule that would open the unserved area to all providers, including AWN.

The Bureau's finding that spectrum warehousing is not a concern because AWN is serving areas considered rural misses the point entirely. The warehousing concerns under the Commission's buildout policy focus only on the areas that remain unserved in BEA171 and are particularly relevant in the present case where seven and one-half years after issuance of the license, 97.4% of the license territory of the license territory remains unserved and more than 90 percent is likely to remain unserved even if AWN meets the waiver conditions imposed by the Bureau requiring it to cover an additional 30 percent of the population by 2019. The waiver would remove any obligation for AWN to undertake further service expansion after the end of the license term and would effectively preclude other providers from serving these areas as they would be subject to the additional costs and conditions imposed by AWN during spectrum lease negotiations. This gives AWN the ability to warehouse this spectrum in the unserved areas by allowing it to lie fallow even if there are other providers ready, willing and able to use that spectrum to serve unbuilt areas of BEA171. One of the major concerns underlying the adoption of the Commission's buildout policies was to remove this possibility in cases where a licensee has failed to make service available to the vast preponderance of its license territory. AWN currently provides service to less than three percent of its service territory.

Finally, AWN's argument that it should be allowed to meet its buildout requirement using a population benchmark must be rejected. The Commission considered and rejected the use of population benchmarks for the spectrum at issue and chose instead to adopt a geographic buildout requirement that relies on market forces to maximize service coverage. AWN was well aware of this buildout requirement when it acquired its license and it is the same buildout requirement that applies uniformly to all Lower 700 MHz A Block licensees. AWN cannot now challenge that buildout policy and should not be allowed pick and choose from among buildout options that it likes best.

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APPLICATION FOR REVIEW OF THE RURAL WIRELESS ASSOCIATION, INC.

The Rural Wireless Association, Inc. (“RWA”), pursuant to Section 1.115 of the rules and regulations of the Federal Communications Commission (“FCC” or “Commission”), seeks review of a decision by the Chief of the Mobility Division of the Wireless Telecommunications Bureau (“WTB” or “Bureau”) released June 6, 2017 in the above-captioned proceeding.¹ That decision granted to Alaska Wireless Network, LLC (“AWN”) (a wholly-owned subsidiary of GCI Communication Corp.) a waiver of both the interim and final geographic coverage requirements contained in rule section 27.14(g) for its Lower 700 MHz A Block license, Call Sign WQJU656 (Basic Economic Area (BEA) 171- Anchorage, Alaska). The waiver is conditioned, *inter alia*, upon AWN meeting certain population coverage benchmarks during the remainder of its license term and into the renewal term. Without the waiver, the rules would reduce AWN’s current license term by two years, from June 13, 2019 to June 13, 2017 due to

¹ Letter from Roger S. Noel, Chief, Mobility Division, Wireless Telecommunications Bureau, to Cindy Hall, Alaska Wireless Network, LLC, DA 17-548, WT Docket No. 16-402, rel. June 6, 2017 (“Waiver Letter”).

AWN's failure to provide coverage to at least 35% of its license area by December 13, 2016.² The waiver also protects AWN from losing the exclusive right to construct and provide service to what would be substantial portions of BEA171 that will remain unbuilt and unserved at the end of the license term as long as the waiver conditions are met. The Waiver Letter stands in conflict with FCC regulation, past precedent, and public policy, and establishes a harmful precedent which should be overturned.

I. Summary of Facts

Lower 700 MHz A Block license WQJU656 was originally issued to Triad 700, LLC ("Triad") in January 2009, following Auction No. 73. That license was subsequently assigned by Triad to T-Mobile License, LLC (T-Mobile") in December, 2014 (*see* ULS File No. 0006470607) and acquired from T-Mobile by AWN on June 22, 2016 (*see* ULS File No. 0006826907). Like all Lower 700 MHz A Block licenses, WQJU656 was issued subject to an interim construction deadline requiring the license holder to provide coverage to at least 35 percent of the geographic area of BEA171 by June 13, 2013 (later extended to December 13, 2016³) and a final construction deadline requiring it to provide coverage to at least 70 percent of the geographic area of BEA171 by the end of the license term.

In anticipation of its upcoming December 13, 2016 interim construction deadline, AWN filed the Waiver Request on December 7, 2016, and proposed to satisfy the interim and final construction requirements by covering 50 percent of BEA171's population by December 13,

² AWN admits that it will not be able to meet the geographic coverage benchmarks in BEA 171. *See Petition of General Communication, Inc. for Waiver of Lower 700 MHz Build-out Requirements*, ULS File No. 0007582863 at pp.3-4, 6 (filed Dec, 7, 2016) (Waiver Request).

³ *See Promoting Interoperability in the 700 MHz Commercial Spectrum*, Report and Order and Order of Proposed Modification, 28 FCC Rcd 15122 (2013).

2016, and 80 percent of its population by June 13, 2019.⁴ Significantly, in its Waiver Request AWN admits that prior to its acquisition of the license from T-Mobile less than six months before the first buildout deadline of December 13, 2016, “T-Mobile, and previous licensees, had not begun any construction in Alaska, leaving GCI with the difficult task of meeting the Commission's interim 35% coverage deadline in only a few short months.”⁵ In other words, for seven and one-half years, WQJU656 was allowed to lie fallow, while other carriers were precluded from putting that spectrum into service. AWN’s Waiver Request was put out on public notice and RWA filed comments in opposition.⁶

In its comments, RWA argued that granting a waiver of geographic-based construction requirements in Section 27.14(g) would undermine the rule's purpose, which was to prevent the warehousing of spectrum and provide competing service providers with an opportunity to put that spectrum into service in some or all of the areas left unserved by the licensee. For that reason, RWA pointed out that the waiver granted to AWN would not serve the public interest, as required by Section 1.925 of the Commission’s rules. RWA also argued that harsh conditions and extremely low population densities in Alaska do not in and of themselves warrant waiver

⁴ Waiver Request at p. 2. AWN’s construction notification filed on December 27, 2016 takes great care to avoid stating what percentage of its license territory AWN was actually serving as of December 13, 2016, choosing instead to rely entirely upon a population based showing and argument in anticipation of receiving a waiver. See ULS File No.0007601845, Exhibit 1 – Buildout Demonstration and Engineering Qualification. The reason for this becomes readily apparent in AWN’s updated coverage filing, submitted as required by the Waiver Letter. This updated coverage filing shows that as of June 28, 2017, more than eight and one-half years after the license was granted, only 2.6% of BEA171 (17,354.16 square miles out of 663,205 square miles) has service coverage, far short of the required 35%. See ULS File No. 0007833825, Buildout Demonstration and Engineering Qualification at p.1.

⁵ Waiver Request at p. 3 (citation omitted).

⁶ Rural Wireless Association Comments, WT Docket Nos. 16-402 and 16-335 (Jan. 3, 2017) (“RWA Comments”).

relief under Section 1.925 and that the waiver would actually foreclose providers other than AWN from using that spectrum to expand service to unserved portions of the license area.⁷

The Bureau, acting on delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, nevertheless found that granting a waiver, conditioned on meeting the revised population benchmarks proposed by AWN, would serve the public interest by “fostering the provision of new wireless services to Alaskans . . . [and] that absent a waiver, the unique geography and climate of Alaska could impede the timely provision of new wireless services to its citizens, especially those residing in remote areas, frustrating Section 27.14(g)’s core purpose of promoting spectrum access and service, particularly in rural areas.”⁸ The Bureau dismissed RWA’s warehousing concerns as unsupported by the record, citing the fact that AWN has “deployed new 700 MHz coverage in portions of Anchorage, Eagle River, the Matanuska-Susitna Valley, Kenai-Soldotna, and the remote Prudhoe Bay Oilfield . . . [and] that it currently has projects underway . . . in Fairbanks, Juneau, Kodiak, Ketchikan, Girdwood, Nome, Sitka, Wrangell, and the Kenai Peninsula.”⁹ The Bureau also believed that RWA’s concerns would be adequately addressed by imposing an additional waiver condition that requires AWN to negotiate in good faith with any third party seeking to acquire or lease spectrum in a geographic area of BEA171 not served by AWN.¹⁰

⁷ RWA Comments at pp. 4-6.

⁸ Waiver Letter at p. 8.

⁹ Waiver Letter at p. 8 (footnotes omitted). As indicated above, according to its most recent filing, AWN is currently providing coverage to a mere 2.6% of its license area. By focusing in on the population centers receiving coverage from AWN in dismissing RWA’s warehousing concerns rather than acknowledging the fact that no coverage is being provided to 97.4% of the license area, the Bureau attempts to sidestep the simple truth that its decision undermines one of the central purposes of the buildout rule, which is to extend coverage over as large a geographic area as possible.

¹⁰ Waiver Letter at p. 9.

II. Question Presented for Review

The question presented to the Commission in this Application for Review is whether the WTB impermissibly granted AWN a waiver of the geographic buildout obligations imposed by Section 27.14(g) pursuant to FCC Rule Section 1.925(b)(3) and under Commission precedent. As demonstrated herein, the waiver grant does not serve the public interest because it undermines the purposes of Section 27.14(g), which are to incent licensees to build out their license areas promptly, and to provide an opportunity to allow other providers, in addition to the licensee, to provide service in areas that the licensee has failed to serve at the end of its license term if it fails to meet the requisite buildout benchmarks. Because AWN's Waiver Request and the Bureau's Waiver Letter fail to satisfy either prong of Section 1.925(b)(3), the waiver was granted in error and the waiver grant should be overturned and rescinded by the Commission.

III. Argument

Section 1.925(b)(3) of the rules provides that the Commission may grant a request for waiver if it is shown that:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, *and* that a grant of the requested waiver would be in the public interest; or
- (ii) 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.¹¹

The Waiver Letter fails to meet either of these standards.

¹¹ 47 C.F.R. §1.925(b)(3) (emphasis added).

A. The Waiver Letter Fails to Satisfy the Waiver Criteria of Section 1.925(b)(3)(i)

With respect to Section 1.925(b)(3)(i)¹², the Waiver Letter focuses entirely upon the “public interest benefit” of requiring AWN to expand service to population centers in BEA171 but does not provide any explanation, much less analysis, that would justify allowing AWN to retain the exclusive right to serve the approximately 97.5% percent of the geographic area of BEA171 that remains unserved more than seven and one-half years after the license was granted. Similarly, the Waiver Letter contains no plausible discussion as to how the waiver granted to AWN furthers the purpose underlying the performance requirements in section 27.14(g) of the rules or how enforcing the geographic construction benchmarks would frustrate the purpose of the rule in this case.

The Bureau’s claim that the waiver is in the public interest is based on the entirely unsupported assertion that “the many unique and unusual circumstances for which AWN must account to serve the entire state of Alaska make it impracticable to meet the applicable geographic construction requirements under Section 27.14(g) and warrant waiver relief.”¹³ The Bureau then checks off a laundry list of factors to support its claim that Alaska is unique and that Alaska’s uniqueness in and of itself justifies the requested waiver. These factors include “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.”¹⁴ The Commission also cites “the far-flung distribution of Alaska’s population across great expanses of unforgiving land” as creating a “specific case[] of hardship”

¹² 47 C.F.R. §1.925(b)(3)(i) (The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest).

¹³ Waiver Letter at p.4.

¹⁴ Waiver Letter at pp.4-5 (footnote omitted).

that was envisioned by the Commission as justifying a waiver of construction requirements when it implemented its 700 MHz rules.

RWA does not dispute that Alaska presents many challenges to service providers due to its size, topography, climate, and remoteness. However, RWA's members serve other remote and rural areas of the country that present similar challenges and these members have worked diligently to meet the Commission's construction deadlines. Simply put, the challenges in Alaska are for the most part different only in degree, not in kind, from the challenges faced by many other rural service providers. The challenges faced by Alaska service providers were well known to Triad when it bid for the Lower 700 MHz A Block spectrum in BEA171, were well known to T-Mobile when it acquired WQJU656 from Triad, and were well known to AWN when it subsequently acquired WQJU656 from T-Mobile. These large, sophisticated companies knew what they faced when they acquired the spectrum and made the business decision to move forward with the spectrum acquisition, all with the full knowledge and expectation that their license area could be reduced to exclude areas that remained unserved at the end of the license term pursuant to rules that were put in place nearly 10 years ago.

The Bureau's attempt to justify its Waiver Letter based on the uniqueness of Alaska is unpersuasive for several reasons. First, the issues faced by service providers in Alaska are not new or unexpected. In adopting its service and buildout rules for the 700 MHz Band, the Commission was certainly aware of the issues facing service providers in Alaska and if it felt that Alaska was somehow *per se* unique, it could have adopted population benchmarks instead of geographic benchmarks for Alaska licenses based on this uniqueness. In the same vein, if the Commission believed that Alaska was so unique and challenging as to warrant its classification as a "specific hardship" (a position apparently taken by the Bureau to justify the Waiver Letter), it could have

exempted Alaska from any buildout obligations entirely on this basis. It did neither of these things. Instead it adopted geographic buildout requirements for the license in question.

The Bureau's attempt to classify its Waiver Letter as involving a "specific case [] of hardship" is totally unsupported by the record in this proceeding where the undisputed facts are that WQJU656 was allowed to lie dormant for more than seven and one-half years after the license was issued and facilities construction began only a few short months before the December, 2016 first construction deadline. This is not a case of hardship. It is one thing to claim hardship where a party is making a diligent effort to comply with buildout requirements and has been unable to meet the buildout deadline due to circumstances outside its control (*e.g.*, unusual weather, natural disaster, work stoppage, delays in receiving needed equipment, *etc.*). It is quite another matter to claim hardship where the spectrum was allowed to lie fallow for seven and one-half years and no efforts were made to build out the license until a few short months before the buildout deadline. Had construction been initiated in a reasonably timely fashion in this case, the licensee might have been able to establish grounds to qualify for a waiver based on hardship, but in order to do so it would have been required to put specific facts on the record to support its hardship claim. No such facts appear on the record in this case and the Bureau's attempt to justify its Waiver Letter on the basis of hardship must fail.

The Commission's original decision to impose geographic construction benchmarks coupled with stringent performance requirements for all previously un-auctioned Economic Area ("EA") and Cellular Market Area ("CMA") Lower 700 MHz licenses was a deliberate policy adopted after careful consideration of the alternatives.¹⁵ In reaching this decision, the Commission

¹⁵ These performance requirements include accelerating the end of the license term by two years if the interim geographic benchmark is not met and a "keep-what-you-use" rule that removes all

considered and rejected using the same “substantial service” benchmark and “rural safe harbor” criteria that it had adopted for previously auctioned 700 MHz licenses.¹⁶ The Commission clearly indicated its expectation “that licensees [would] take these construction requirements seriously” and made clear that it “[did] not envision granting waivers or extensions of construction periods except where unavoidable circumstances beyond the licensee’s control delay construction.”¹⁷ There are no such unavoidable circumstances in this case, where the licensee has freely conceded that no construction was undertaken during the first seven and one-half years of the license term.

The Commission also explained that geographic benchmarks would “better promote access to spectrum and the provision of service, especially in rural areas”¹⁸ Specifically, the Commission noted that “[b]y taking advantage of the excellent propagation characteristics of the spectrum in the 700 MHz Band, which enables broader coverage at lower costs, we promote the provision of innovative services to consumers *throughout the license areas, including in rural areas.*”¹⁹ The Commission could not have made its intent more clear when it stated that “[w]ith regard to the use of geographic-based benchmarks for licenses based on CMAs and EAs, *we seek to promote service across as much of the geographic area of the country as is practicable.*”²⁰

unserved areas from the license territory if the end of term benchmark is not met. See 47 C.F.R. §27.14(h).

¹⁶ Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, et al.; Second Report and Order, WT Docket No. 06-150, et al., rel. Aug. 10, 2007 (“Second Report and Order”) at ¶153.

¹⁷ *Id.* As indicated above, there is absolutely no record evidence to indicate the presence of such circumstances.

¹⁸ *Id.*

¹⁹ Second Report and Order at ¶154 (emphasis supplied).

²⁰ *Id.* at ¶158 (emphasis supplied).

Significantly, the Commission specifically considered and rejected imposing a population based buildout requirement for CMA and EA based licenses as advocated by several larger carriers, and chose instead to require carriers to maximize geographic coverage within their markets, stating:

With regard to the use of geographic-based benchmarks for licenses based on CMAs and EAs, we seek to promote service across as much of the geographic area of the country as is practicable. . . . We agree . . . that the uniqueness of the 700 MHz spectrum justifies the use of geographic benchmarks and that the band's excellent propagation characteristics make it ideal for delivering advanced wireless services to rural areas. Accordingly, for licenses based on these CMAs and EAs that are well-suited for providing service in rural markets, we establish benchmarks that require build-out to a significant portion of the geographic area.²¹

AWN's Waiver Request serves only one purpose – to avoid application of the “keep-what-you-use rule” and allow AWN to retain exclusive rights to Lower 700 MHz A Block spectrum throughout the entirety of BEA171 without any requirement to expand its coverage to the vast preponderance of the market territory that will in all likelihood remain unserved even if all of the conditions set forth in the Waiver Letter are met. This is directly contrary to policies underlying the strict performance requirements adopted by the Commission.

In adopting its performance requirements for unauctioned CMA and EA licenses, the Commission was cognizant of the fact that in certain cases a particular market might be too large or too challenging for a single operator to serve. Its solution was to adopt a “keep-what-you-use” policy to ensure that spectrum can be put to use in unserved areas by providers other than the licensee.

Overall, we conclude that these set of stringent benchmarks applied across smaller service areas with effective consequences for noncompliance, when combined with appropriately sized geographic licensing areas, are the most effective way to promote rapid service to the public, especially in rural areas. As noted above, the most common recommendation for promoting rural service

²¹ *Id.* at ¶158.

made by small and rural providers was that additional licenses be made available based on smaller geographic service areas, which would be more readily available to providers that tend to serve rural consumers.

* * *

[O]ur “keep-what-you-use” rules *provide additional methods for making smaller license areas available*, thus promoting access to spectrum and the provision of service, especially in rural areas. This rule ensures that others are given an opportunity to acquire spectrum that is not adequately built out and provide services to those who reside in those areas. In this way, our rules are pro-competitive and help ensure service to communities that might otherwise not receive service. In sum, we conclude that our approach should effectively promote service, including in rural areas, while establishing a clear regulatory framework for licensees as they develop their business plans.²²

During the rulemaking proceeding resulting in adoption of the performance requirements, RWA (fka Rural Telecommunications Group, Inc.) repeatedly emphasized the importance of adopting rules that would prevent spectrum warehousing.²³ To ensure that the rules achieve their intended purpose, the FCC must enforce them fairly. The Bureau’s Waiver Letter fails to do so.

The Bureau’s Waiver Letter rests upon the false and entirely untested premise that application of the Commission’s strict performance requirements would impair, rather than further, the provision of service to unserved areas in BEA171. In granting the waiver requested by AWN, the Bureau, without any analysis, simply accepted AWN’s arguments that the waiver was necessary to ensure that service was expanded to unserved areas and new communities.

We concur with AWN that without the requested waiver relief, it would lose authorization to serve most of the License area at the June 13, 2017, accelerated end-of-license term construction deadline, which would impede its ability to expand to other areas of Alaska in need of service. AWN states that absent a

²² Second Report and Order at ¶¶155-156 (emphasis added).

²³ See Comments of the Rural Telecommunications Group, Inc., WT Docket No. 05-160, et al., September 29, 2006, at pp. 8-9; Comments of the Rural Telecommunications Group, Inc., WT Docket No. 05-160, et al., May 23, 2007, at pp. 8-12; Reply Comments of the Rural Telecommunications Group, Inc., WT Docket No. 06-150, et al., June 4, 2007, at pp. 8-11.

waiver, it would be forced “to cover entirely unpopulated areas that are larger than many U.S. states” at great expense simply to meet the geographic construction benchmarks. In the foregoing circumstances, we do not believe the public interest is served by rigid application of geographic-based as opposed to population-based construction benchmarks, where doing so would require construction of vast unpopulated areas of Alaska simply to meet the benchmarks.²⁴

This Bureau’s wholesale acceptance of AWN’s rather implausible argument is simply absurd. No rational person would believe for a single minute that AWN would make a business decision to invest substantial capital to build out large swathes of uninhabited territory, to the detriment of populated areas where customers would purchase and actually use their service, just to avoid application of the “keep what you use” rule at the expiration of the license term. To the contrary, RWA expects that AWN’s construction plans would remain largely the same whether or not the Commission granted the requested waiver and those plans would be to prioritize construction in populated areas. The only calculus that changes based on the Bureau’s Waiver Letter is whether the remaining unserved areas in BEA171 (presently standing at 97.4 percent of the license area and not likely to drop substantially below that number even should AWN increase its population served from 50% to 80% under the terms of the Waiver Letter) will be better and more quickly served by allowing multiple providers in addition to AWN to apply to serve those areas at the end of the license term.²⁵

In opening up unserved geographic areas to other rural carriers motivated to serve the areas where their subscribers live, work and play under the keep-what-you-use rule, the Commission did not preclude the incumbent licensee from applying to serve some or all of the unserved territory that

²⁴ Waiver Letter at pp. 5-6 (citations omitted).

²⁵ AWN has already cream-skimmed its license area as evidenced by its most recent buildout showing that indicates it is serving 50 percent of the population in BEA171 while only covering approximately 2.6% percent of the geographic area comprising its market. Even if AWN had to quadruple its geographic coverage in order to serve the additional 30% of the population required by the Waiver Letter, this would leave approximately 90% of the licensed territory unserved.

previously had been part of its license area. Section 27.14(j) of the Commission's rules only restricts the licensee from applying to serve any portion of the reclaimed area for a period of thirty days following the issuance of a public notice by the Bureau that the reclaimed license area is available for reassignment. The purpose of this provision is to give third party providers the first opportunity to apply for areas that the incumbent licensee had the opportunity, but failed, to serve. After expiration of that 30-day window, the incumbent licensee remains free to apply for any unserved areas that have not been applied for during that initial window. Application of the Commission's rules as written serves to incent, and not as claimed by the Bureau delay, service to new communities and unserved areas by making the spectrum more widely available to all qualified applicants, including the incumbent licensee, in furtherance of the stated policies underlying the rules.

B. The Waiver Letter Fails to Satisfy the Waiver Criteria of Section 1.925(b)(3)(ii).

Likewise, the Waiver Letter fails to provide support for the relief granted to AWN under Section 1.925(b)(3)(ii) of the rules.²⁶ While RWA acknowledges that Alaska is large, rural, low density, and subject to weather extremes, it is not entirely unique in this regard. There are other areas of the country outside of Alaska that are rural, low density and subject to weather extremes and that also present their own terrain challenges.

Nor can it be seriously argued that AWN is in any different position than any of the other 700 MHz licensees that are subject to the same geographic benchmarks and stringent performance requirements for their licenses and there is nothing inequitable about requiring AWN to comply with FCC construction requirements. AWN, as a sophisticated carrier,

²⁶ 47 C.F.R. §1.925(b)(3)(ii)(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).

undoubtedly factored in the impact of the “keep-what-you-use” rule when it negotiated to acquire WQJU656 from T-Mobile in 2016 and discounted the purchase price accordingly.

More importantly, denying AWN’s waiver request would not prevent AWN from continuing to expand service within BEA171 should it desire to do so since it would remain free to apply to the Commission to expand its service into the unserved areas in BEA171 pursuant to Section 27.14(j)(2) of the Commission’s rules. The only advantage AWN would lose is the ability to keep other providers from serving the unserved portions of BEA171, an advantage that does not support either the public interest or the policies that underlie the rules.

Simply put, AWN is in no way harmed, burdened, or disadvantaged by application of the geographic construction benchmarks contained in Section 27.14(g) and other performance requirements contained in Section 27.14(h) of the Commission’s rules. Meanwhile, the waiver granted by WTB provides a windfall to AWN by allowing it to warehouse spectrum in an area covering hundreds of square miles within its market without any build out obligations beyond the modest conditions contained in the Waiver Letter. The Bureau’s Waiver Letter thus directly undermines the purpose and policies underlying the strict performance requirements that apply to all Lower 700 MHz A Block licensees and, by precluding market entry by other providers, ultimately disserves the public interest.

C. Good Faith Negotiations Requirement Does Not Cure the Waiver Deficiencies.

The Bureau has attempted to shore up the infirmities in its waiver analysis and deal with spectrum warehousing concerns by imposing as a condition of the waiver a requirement that AWN engage in good faith negotiations with any third party that wants to acquire the rights,

through sale or lease, to serve the unserved areas of BEA171.²⁷ Specifically, the Waiver Letter states “AWN's commitment to negotiate in good faith with any third party seeking to lease spectrum in an area AWN does not serve, which we have included as a waiver condition, will ensure other providers have spectrum access in unserved areas.”²⁸

Initially, a requirement to engage in good faith negotiations does not guarantee third party access to AWN's spectrum in unbuilt areas. The requirement to negotiate in good faith is not the same as requiring a party to make a deal. Take, for example, the fact that the FCC has spent the last year and one-half wrestling with what constitutes a failure to negotiate in good faith in the context of retransmission consent negotiations without yet being able to issue an order on how to better define the presence or absence of good faith in market negotiations.²⁹ While RWA appreciates the inclusion of a good faith bargaining requirement in the Waiver Letter, such a requirement is simply inadequate to ensure access by multiple providers to areas unserved by AWN.

Additionally, it is grossly inconsistent for the Bureau to take the position that reliance on the keep-what-you-use rule in BEA171 could delay service to unserved areas and new communities by AWN while at the same time requiring third party providers desiring to serve those same areas to negotiate a purchase agreement or spectrum lease with AWN when those negotiations would invariably drag on for months with no guarantee that an agreement would ever be forthcoming. Similarly, it is inconsistent for the Bureau to take the position that the

²⁷ Waiver Letter at p. 8.

²⁸ Waiver Letter at p. 6.

²⁹ *See In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, MB Docket 15-216, Notice of Proposed Rulemaking, FCC 15-109 (rel. September 2, 2015).

difficulties of providing service in rural Alaska are so onerous that they justify granting relief to AWN without also acknowledging that those burdens 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 AWN and pay AWN to lease spectrum.

The imposition of a good faith negotiation condition requirement on AWN's waiver is not a burden but rather represents another windfall that rewards AWN for failing to meet its buildout obligations. Instead of allowing other third party providers to have the opportunity to provide services throughout a rather large unserved geographic area on equal footing with the licensee, AWN can instead require that competing service providers pay it for the privilege of serving those areas AWN has chosen not to serve. This stands the performance requirements on their head and cannot be justified on any public interest grounds.

IV. Conclusion

For the reasons set forth above, the Waiver Letter should be rescinded. The Waiver Letter failed to satisfy the criteria for grant of a waiver set forth in Section 1.925. The Waiver Letter failed to demonstrate that a waiver would serve the public interest, or that a waiver was consistent with the underlying purpose of the rule. The Bureau likewise failed to provide any evidence to support its claim that the waiver was necessary to expand the provision of service to the public and ignored all indications that the waiver would have just the opposite results. Finally, the Bureau failed to demonstrate how enforcing the Commission's performance requirements would be inconsistent with the underlying purpose of the rule, which was to maximize the geographic availability of advanced services using 700 MHz spectrum. The Bureau's grant of a waiver in these circumstances establishes dangerous precedent which

eviscerates and re-writes existing law and conflicts with case precedent and Commission policy, and should therefore be reversed and rescinded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day of July 6, 2017, served a true copy of the foregoing document by electronic mail upon the following:

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