

**Before the
Federal Communications Commission
Washington, DC 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)	

REPLY OF THE RURAL WIRELESS ASSOCIATION, INC.

The Rural Wireless Association, Inc. (“RWA”), pursuant to Section 1.115(d) of the rules and regulations of the Federal Communications Commission (“FCC” or “Commission”), hereby replies to the Opposition to Application for Review (“Opposition”) filed by Alaska Wireless Network, LLC (“AWN”) in the above-captioned proceeding. The Opposition was submitted in response to RWA’s Application for 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 The Bureau’s decision granted AWN 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).

In its Opposition, AWN argues that the Bureau appropriately granted the waiver because it found that “the Commission’s build-out requirements would hinder, rather than advance, rural

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”).

wireless deployment” in the context of an Alaska-wide license.² AWN also argues that “[t]he Bureau properly concluded that, due to the unique circumstances facing AWN (i.e., the unreasonable task of extending commercial wireless service across 75% of the entire state of Alaska, including vast unpopulated areas), strict application of the build-out rule would be contrary to the public interest.”³ Neither of these arguments is sustainable.

AWN’s argument that the Commission’s buildout requirements hinder rather than encourage expansion of service to rural areas is not based on any empirical evidence. There has been no showing that the Commission’s buildout requirements applicable to 700 MHz spectrum have failed to function as intended or that they have had any impact other than incenting licensees to put their spectrum into service more quickly than might otherwise have been the case in the absence of a buildout obligation. Essentially AWN’s argument boils down to the fact that because AWN acquired the license in question a few short months before the interim buildout deadline of December 13, 2016, it needed more time than the one year window measured from June 22, 2016, when it acquired the license from T-Mobile, until June 13, 2017 (which would have been the accelerated license expiration date for failing to meet the December 13, 2016 interim construction deadline) to provide coverage and service availability to the 80 percent of Alaska’s population that it has committed to serve as a condition of obtaining the buildout waiver.

² Opposition at p. 1.

³ Id. at pp.1-2.

AWN's own words are especially telling in this regard. After running through a laundry list of the challenges which it faces in extending coverage and service in BEA171 (*e.g.*, extreme weather, limited infrastructure, extensive land mass, and low population density),⁴ AWN states:

AWN concluded that it was simply impracticable to extend wireless coverage to 500,000 and then 1.2 million square kilometers of largely uninhabited area, especially under Alaska's extremely challenging construction conditions. This effort would have diverted resources away from projects to cover rural, but still populated, areas where wireless service would actually be used. Worse still, the prospect of losing access to substantial portions of the license area through the Commission's keep-what-you-use rules threatened to limit AWN's ability to invest in other aspects of its network infrastructure, such as backhaul capacity. These investments would be needed to serve rural areas that AWN might not have been able to reach by the end of its license term, but would have been able to reach soon thereafter if the "acceleration rule" had not been triggered.⁵

AWN's own words show that at the time it acquired its license from T-Mobile, it had already concluded that it would be impractical to build out the more than 90 percent of BEA171's territory that will continue to remain without service even assuming AWN meets the 80 percent population coverage benchmark incorporated as a condition of its waiver, and it is safe to infer from this statement that AWN has no present plans to build out this vast area. More important, AWN's statement clearly demonstrates that the obstacle it faced in extending service to cover the 80 percent of the population that it desired to serve was *not* that the Commission's buildout rules hinder rather than encourage the provision of service to rural areas as both the Bureau and AWN have claimed, but rather the fact that the license was allowed to lie fallow for more than seven years by the previous licensees, leaving AWN insufficient time to meet its own buildout goals after acquiring the license. The fact that AWN has indicated an ability and willingness to construct facilities sufficient to enable it to cover 80 percent of the market population in just

⁴ Id. at pp. 3-5.

⁵ Id. at p. 5

three years demonstrates conclusively that it was the failure of the prior licensees to undertake any construction for more than seven years after license grant, and not the application of the Commission's buildout rules, that would be responsible for any delays in extending service rural areas.

RWA wishes to make clear that this proceeding is not about whether AWN's efforts to serve BEA117 once it acquired the license on June 22, 2016 have been diligent or timely. Rather, it is about giving the buildout requirements that the Commission adopted for Lower 700 MHz A Block licenses generally, including the license at issue here, and the procompetitive policies underlying those buildout requirements an opportunity to function as intended. Under these policies, where a licensee fails to meet the interim buildout deadline its license term is reduced by two years. If the licensee fails to meet its end of term buildout requirement, the unserved area becomes available for reassignment to any provider, *including the licensee*, pursuant to section 27.14(j) of the Commission's rules. The buildout rules are designed to provide an incentive for the existing licensee to continue to expand service to rural and remote areas and, in cases where benchmarks are not met, to provide opportunities for other carriers to do so as well.

The flaw in AWN's argument and the Bureau's reasoning is that they both fail to explain or justify why a waiver is necessary in this case. Even assuming *arguendo* that BEA117 is entirely rural and that expansion of service by AWN by definition serves the underlying purpose of the rule to expand service to rural areas, there is no discussion or analysis provided as to why a waiver is necessary to accomplish this purpose. By enforcing the rule as written, the FCC will open up vast unserved areas in BEA117 to all competing service providers, including AWN. The argument that the unserved area in BEA117 would receive less service if it were opened to

competition than if AWN were alone entitled to provide service is purely speculative and rests on two dubious propositions: first that no rural provider would desire or be able to serve any portion of the vast areas (likely to exceed 90 percent of the territory of the State of Alaska) that will remain unserved by AWN even after it meets the waiver condition to serve 80% of BEA117's population; and second, that if faced with the prospect of competition, AWN would choose to roll over and reduce its investment in building out its territory rather than compete.⁶ RWA urges the Commission to reject these claims and believes that just the opposite is true. In the absence of a waiver and in the face of either potential or actual competition AWN would have the same incentive, if not a greater incentive, to expand service in BEA117.

While it is true that the 80 percent population condition imposed by the Bureau represents a higher population-based benchmark than is typically required in any other commercial service which promotes rural build-out, the Commission should not lose sight of the fact that even with this expanded population coverage upwards of 90 percent of the territory of BEA117, a geographic area which according to AWN covers approximately 1.2 million square kilometers,

⁶ AWN argues that the possibility that a provider might apply to serve a portion of any territory reclaimed by the Commission under its "keep what you use" rule would reduce service to rural areas by threatening to strand AWN's investment in infrastructure such as backhaul facilities and AWN would therefore elect to forego this investment. Opposition at pp. 12-13. This argument ignores the fact that providers plan their networks to be scalable and that the required infrastructure investment would be made in any event—either by AWN itself if there were no other applicants for reclaimed areas or by a competing provider seeking to serve the reclaimed area. Similarly unpersuasive is AWN's speculative claim that an applicant might choose to apply for reclaimed area merely to resell that license to AWN as the only viable licensee Opposition at p. 13. This argument ignores that the Commission has in place and strictly enforces a longstanding policy to prevent such greenmail attempts. *See e.g.*, 47 C.F.R §1.935. This argument also ignores the fact that Section 27.14(j)(3) of the Commission's rules requires an applicant for reclaimed areas to construct 100 percent of its licensed territory within one-year or its authority automatically terminates and the applicant would be precluded from re-applying. Clearly this provision ensures that only serious applicants would apply to serve reclaimed areas.

would remain unserved. The real question before the Commission is whether enforcing its buildout rules that would open this extensive area to competing service providers in addition to AWN or granting a waiver which would effectively preclude service by any provider other than AWN better serves the public interest and the underlying purpose of the buildout requirements to maximize coverage and service availability throughout the license area.

Likewise, AWN's arguments that the existence of competing providers willing to serve BEA117 is speculative and that enforcement of the rule could thus actually undermine or delay the expansion of service to rural areas are disingenuous at best. AWN's Opposition, like the Bureau's Waiver Decision, entirely ignores the fact that even without a waiver AWN would remain free to apply to expand service to any new pockets of population that may emerge over time in BEA117. Denial of the waiver would simply mean that the more than 90 percent of the license territory that AWN fails to serve by the end of its license term would be available for other service providers to apply to serve as well. By arguing in its Opposition that that this territory is unlikely to be served by anyone other than the incumbent licensee,⁷ AWN is actually admitting that no waiver of the rules is necessary because in that case AWN would still remain free to apply to serve any portion of the unserved area that has been reclaimed by the Commission and would be able to do so without having to face competing applications from other providers.

Application of the buildout requirements serves an important purpose -- to prevent the incumbent, in this case AWN, from locking other service providers out of the approximately 90 percent of the BEA171 territory that will remain unserved even should AWN meet the conditions of its waiver. The Commission should give its buildout rules, first proposed and

⁷ Opposition at pp. 10-11.

adopted specifically for 700 MHz licenses, a chance to succeed. The Commission should not effectively give AWN a windfall by allowing it to lock up and warehouse Lower 700 MHz A Block spectrum in a geographic area covering over a million square kilometers, an area that would likely remain unserved by AWN long after expiration of the license term (whether accelerated or not). AWN's attempt to mischaracterize RWA's spectrum warehousing arguments are unavailing. RWA does not argue that AWN will warehouse spectrum in the areas in which it is planning to build to meet its waiver conditions as has been characterized by AWN.⁸ RWA's warehousing concerns have always focused on the 1 million or so square kilometers of BEA171 that AWN will have no obligation to build once it meets the 80 percent population coverage waiver condition, as well as the clear spectrum warehousing engaged in by T-Mobile, the previous licensee, behavior which the Waiver Letter now incents future licensees to engage in.

AWN acquired its Lower 700 MHz A Block license knowing full well what its buildout obligations would be and also knowing that it would not be able to meet either the interim or final buildout benchmarks required under Section 27.14(g) of the rules for that license. As a sophisticated service provider, AWN undoubtedly took the Commission's buildout rules into account in valuing the license acquired from T-Mobile. AWN however now argues that by enforcing those same buildout requirements the Commission would be punishing AWN "for the previous licensee's failure to make any progress toward the buildout requirements" and that such a policy would "constitute yet another impediment to rural deployment" which would "freeze the secondary markets for such licenses, disincentivizing licensees from transferring the licenses, in

⁸ Id. at p.10.

the event they are unable to build-out, to licensees with the ability and desire to serve rural areas.”⁹

AWN’s characterization of itself as a victim conveniently overlooks the fact that the Commission has in place a long-standing and well-established policy against allowing the license assignment process to be used to justify extending buildout deadlines in cases where the incumbent licensee has not met its buildout obligations. Section 1.946(e) of the Commission’s rules permits licensees to request an extension of construction deadlines by filing FCC Form 601 in advance of the applicable deadline. Section 1.946(e)(3) of the rules, however, clearly states that “[e]xtension requests will not be granted for failure to meet a construction or coverage deadline because the licensee undergoes a transfer of control or because the licensee intends to assign the authorization. The Commission will not grant extension requests solely to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct.”

Less than a week after releasing its Waiver Decision in this case, the Bureau released a public notice reaffirming this longstanding policy,¹⁰ a policy which was undoubtedly well-known to AWN when it acquired the license from T-Mobile. In the recent *Buildout Notice*, the Commission made clear that “it is a licensee’s responsibility to conduct its due diligence, to assure that it can construct and meet service requirements, and to confirm that the spectrum is suitable for the licensee’s business plans and needs.”¹¹ The *Buildout Notice* also made clear that buildout extensions “are permitted only in two situations,—either ‘involuntary loss of site’ or

⁹ Id. at p.15.

¹⁰ *Wireless Telecommunications Bureau Reminds Wireless Licensees of Construction Obligations*, Public Notice, DA17-573 (rel. June 12, 2017) (“*Buildout Notice*”).

¹¹ *Buildout Notice* at p.2 (citations omitted).

‘other causes beyond [a licensee’s] control’”¹² neither of which are present in this case. The *Buildout Notice* also reaffirmed that a license assignment, even an assignment to allow an “assignee to complete facilities that the transferor or assignor failed to construct” does not qualify as grounds for an extension.¹³

Despite the clear policy that the Commission will not grant extensions of buildout requirements to allow an assignee such as AWN additional time to construct an unbuilt license, the Bureau’s Waiver Decision dismissed RWA’s arguments that by rule AWN was ineligible for an extension of the construction deadline with the simple statement that it was not basing its waiver on section 1.946 of the rules.¹⁴ By ignoring the constraints and policies embodied in the Commission’s general buildout rule, the Bureau has acted both arbitrarily and capriciously and, in failing to explain how actions can be squared with the rule, the Bureau’s decision is legally unsustainable. While the Bureau may not have based its decision to extend the buildout requirement on section 1.946 of the rules, that decision does not mean that the Bureau was free to ignore the constraints that this rule imposes on Bureau’s authority. To the extent that the Bureau has the authority to waive 1.946(e)(3) it must justify its decision to do so. It may not simply ignore the rule and having done so in the present case committed reversible error.

VI. CONCLUSION

For the reasons set forth above and in RWA’s Application for Review, the Waiver Letter should be rescinded. The Waiver Letter failed to satisfy the criteria for grant of a waiver set forth in the Commission’s Rules. There is no factual or analytical predicate upon which to conclude

¹² *Id.*

¹³ *Id.* at pp. 2-3.

¹⁴ Waiver Decision at p. 4.

that a waiver is necessary to serve the public interest, or that granting a waiver would be consistent with the underlying purpose of the rule. In point of fact just the opposite is true. 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,

RURAL WIRELESS ASSOCIATION, INC.

/s/ Caressa D. Bennet

Outside Counsel:

Howard Shapiro, Esq.
Bennet & Bennet, PLLC
6124 MacArthur Boulevard
Bethesda, MD 20816
(202) 371-1500
hshapiro@bennetlaw.com

Caressa D. Bennet, General Counsel
5185 MacArthur Boulevard, NW
Suite 729
Washington, DC 20016
(202) 551-0010
legal@ruralwireless.org

August 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have on this day of August 3, 2017, served a true copy of the foregoing document by electronic mail upon the following:

Chris Nierman
Senior Counsel, Federal Affairs
Kara Leibin Azocar
Regulatory Counsel, Federal Affairs
GCI Communication, Inc.
1900 L St., NW, Suite 700
Washington, D.C. 20036
cnierman@gci.com
kazocar@gci.com

Paul Margie
Paul Caritj
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, 8th Floor
Washington, D.C. 20036
pmargie@hwglaw.com
pcaritj@hwglaw.com

Cindy Hall
The Alaska Wireless Network, LLC
2550 Denali Street, Suite 1000
Anchorage, AK 99503
gcilicensemanager@gci.com

Roger S. Noel
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
Roger.Noel@fcc.gov

/s/ Linda Braboy

Linda Braboy, Paralegal
Bennet & Bennet, PLLC
6124 MacArthur Boulevard
Bethesda, MD 20816
202-371-1500