

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Connect America Fund Phase II Auction)	AU Docket No. 17-182
)	
Connect America Fund)	WC Docket No. 10-90
To:	Chief, Wireline Competition Bureau	
	Chief, Wireless Telecommunications Bureau	

PETITION FOR WAIVER

Sunset Digital Communications, Inc. (“SDC Inc.”), pursuant to Section 1.3 of the Commission’s Rules, hereby respectfully requests a waiver of Section 54.315(b)(6)(iv) of the Commission’s rules (the “Major Modification Rule”),¹ to permit Sunset Digital Communications, LLC (“SDC LLC”) to acquire and assume SDC Inc.’s rights and obligations as a Connect America Fund (“CAF”) Phase II Auction winner. As set forth below, good cause exists to grant this waiver request, and the Commission’s grant will serve the public interest.

Background

SDC Inc., a provider of rural broadband services to more than 3,400 customers through direct connectivity and approximately 90,000 end users indirectly, was a winning participant in Auction 903, designated to receive \$23,979,452.60 in support of its rural broadband deployments in Virginia, and \$5,595,554.80 for Tennessee.² When SDC Inc. filed its short-form Auction 903 application on March 30, 2018, it was a standalone entity with one subsidiary. However, it had entered into an agreement whereby ITC Capital Partners, LLC (“ITC”), through its subsidiary Point Broadband, LLC (“Point Broadband,” and collectively with “ITC,” the “Purchasers”),

¹ The Major Modification Rule effectively prohibits an applicant from engaging in a transfer of control after submission of a short-form auction application.

² On November 15, 2018, SDC Inc. filed its application for designation as an Eligible Telecommunications Carrier with the Commission.

would acquire a controlling interest in SDC Inc. (the “Transaction”). With its short-form filing, SDC Inc. informed the Commission of the Transaction and the parties involved, and of SDC Inc.’s intention to file a request for waiver of the Major Modification Rules (the “Pre-Auction Notification”).³ SDC Inc. subsequently filed its Petition for Waiver (the “Petition”) on April 17, 2018. On June 6, 2018, prior to Commission action on the Petition, SDC Inc. withdrew the Petition.⁴

On March 30, 2018, SDC Inc. filed a Section 214 transfer of control application (the “214 Application”) regarding the Transaction.⁵ The 214 Application provided extensive information about SDC Inc., ITC, and Point Broadband, and explained that Sunset Digital Holding, LLC (“Holding”), a newly organized holding company which was wholly owned by Point Broadband, would become the direct parent of SDC Inc. The Commission issued a public notice regarding the 214 Application on April 25, 2018.⁶ The Commission granted the 214 Application on May 29, 2018.⁷ That transaction was not consummated because the transfer of control would have required waiver of the Major Modification Rule at a time when the SDC Inc. was focused on the auction and the parties were discussing reconstituting the transaction as an asset, rather than stock, acquisition.

SDC Inc. and the Purchasers have now entered into a new agreement that effectively revives the Transaction in different form. There are two variances from the transaction as it was disclosed in the Pre-Auction Notification, the Petition, and the Section 214 Application: (1) the

³ Memorandum, Sunset Digital Intent to File Waiver of Commission’s Rules, including 47 C.F.R. § 121001(d)(4) and 47 C.F.R. § 54.315(b)(6)(4) (“Pre-Auction Notification”), attached to the SDC Inc. short-form application.

⁴ See Letter from James C. Falvey, Esq., to Marlene H. Dortch, FCC Secretary (June 6, 2018).

⁵ See WC Docket No. 18-98.

⁶ Public Notice, *Domestic Section 214 Application Filed for the Transfer of Control of Sunset Digital Communications, Inc.*, WC Docket No. 18-98 (rel. Apr. 25, 2018).

⁷ Public Notice, *Notice of Domestic Section 214 Authorization Granted*, WC Docket No. 18-98 (rel. May 29, 2018).

addition of SDC LLC as a wholly owned subsidiary of Holding to acquire assets of SDC Inc., and (2) the replacement of the stock purchase transaction with SDC LLC's acquisition of an asset of SDC Inc. – the CAF application and attendant benefits and obligations.⁸ Instead of acquiring SDC Inc.'s stock, ITC, through SDC LLC, will acquire SDC Inc.'s CAF asset. The parties now seek Commission consent, and to the extent necessary, a waiver, to permit SDC LLC to acquire and assume SDC Inc.'s rights and obligations as a CAF Phase II recipient.⁹

I. GRANT OF THE WAIVER REQUEST WOULD NOT FRUSTRATE THE PURPOSES OF THE MAJOR MODIFICATION RULE, AND WOULD BE CONSISTENT WITH PRIOR COMMISSION DECISIONS

The circumstances here justify waiver of the Commission's rules pursuant to Section 1.925(b)(3), which states that the Commission can waive a rule if:

(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 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.

The purposes of the Major Modification Rule is to “assur[e] that: an auction applicant's ownership structure, financial condition, and real parties-in-interest are fully disclosed and can be assessed prior to the auction; the representations and certifications in the application remain effective and enforceable while the application is pending; the pre-auction process is transparent; and the Commission, auction participants, and other applicants have consistent and transparent information about the identity of other applicants, which enhances auction competition by

⁸ This is not a material change to the Transaction. As was the case with the abandoned transfer of control, upon consummation, Point Broadband and ITC will control the assets of SDC Inc.

⁹ The organizational charts for SDC Inc. (pre-transaction) and SDC LLC are attached as Exhibit A hereto.

leveling the informational playing field.”¹⁰ Because of the pre-auction actions of SDC Inc. and Purchasers, and the notice provided in SDC Inc.’s short-form application, these objectives would not be frustrated by grant of the requested waiver.

As noted above, SDC Inc. and the Purchasers took three distinct actions that informed the Commission of the earlier Transaction and the parties-in-interest involved. On March 30, 2018, SDC Inc. filed the Pre-Auction Notification as part of its short-form Auction 903 application. Also on that date, the parties filed the 214 Application. And on April 17, 2018, SDC Inc. filed the Petition, which reiterated the details of the proposed transfer of control to ITC, through Point Broadband. These actions all occurred prior to commencement of Auction 903. In sum, the material details of the Transaction were known to the Commission and the public prior to the Auction 903 deadline and prior to commencement of the auction.

In a recent case involving similar circumstances, and also in the context of Auction 903, the Wireline Competition Bureau and the Wireless Telecommunications Bureau (the “Bureaus”) found that grant of the waiver requests of two applicants, Hawaiian Telcom, Inc. and Horizon Telcom, Inc., was justified.¹¹ The applicants were involved in two unrelated transfers of control. Like SDC Inc. here, both had filed Section 214 applications that explained the transactions in advance of the short-form application deadline. Both had disclosed their potential future interest holders as part of their Auction 903 short-form applications.¹² On the basis of these facts, the Bureaus found that granting the waiver requests “w[ould] not undermine Section 1.21001(d)(4)’s objectives because [both] petitioners disclosed their future real parties-in-interests prior to the

¹⁰ Petition of Hawaiian Telcom, Inc. and Cincinnati Bell Inc. for Expedited Waiver of Section 1.21001(d)(4) of the Commission’s Rules, DA 18-661 (WCB, WTB, released June 25, 2018) (“*Hawaiian Telcom*”), at 4.

¹¹ Hawaiian Telcom, Inc. sought a waiver of Sections 1.21001(d)(4) and 54.315(b)(6)(iv). Horizon Telcom, Inc. sought a waiver of Section 1.21001(d)(4).

¹² The disclosures were made through amendments filed after the March 30, 2018 short-form filing deadline.

short-form deadline in their Section 214 filings and included relevant information on their post-transaction ownership in their short-form applications.”¹³

A similar fact pattern has occurred here. SDC Inc. and the Purchasers filed their 214 Application on March 30, 2018, and the Commission subsequently approved the transfer of control on May 29, 2018. Moreover, in the Pre-Auction Notification that was filed as part of its Auction 903 application, SDC Inc. “fully disclosed the[] proposed post-consummation ownership structure[].”¹⁴

Also important to the Commission’s decision in *Hawaiian Telcom* was the fact that the parties had “confirmed the continuing effectiveness of the representations made in the[] auction application[].”¹⁵ Here, the Pre-Auction Notification expressly certified that “all attendant representations and certifications, shall remain effective and enforceable notwithstanding the transaction,”¹⁶ and stated that the new Purchasers “agree[d] to be bound by both the Application and the Applicant’s actions in the auction both before and after the closing of the transaction.”¹⁷ Clearly, the parties here have provided the requisite certification regarding continuing obligations. The requested waiver fits squarely within recent Commission precedent.

The petitioners appreciate that *Hawaiian Telcom* involved requests for *pre-auction* amendment of short-form applications, whereas SDC Inc. and SDC LLC seek to amend SDC Inc.’s *post-auction* long-form application. The petitioners submit that, where the Commission approved SDC Inc.’s short-form application (which also disclosed the Transaction and the Point Broadband/ITC interests), allowed it to participate in Auction 903, and announced it as the winning bidder for nearly \$30 million in support, the Bureaus should be equally, if not more,

¹³ *Hawaiian Telcom* at 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Pre-Auction Notification at 1

¹⁷ *Id.*; see also Pre-Auction Notification at 9.

inclined to approve a waiver of the Major Modification Rule. Fundamentally, the Bureaus had the same information in SDC Inc.'s short-form that it would have had if both SDC Inc. and SDC LLC had both filed short-form applications and later sought to merge. Here, however, the Bureaus are not being asked to approve a waiver of the Major Modification Rule where the auction outcome is unknown, but is being asked to permit the essence of a disclosed transaction to proceed in connection with the post-auction obligations and opportunities for a specific amount of support in defined rural areas of Tennessee and Virginia. It would elevate form over substance if the Bureaus subjected SDC Inc. and SDC LLC to a different outcome than it afforded the parties in the *Hawaiian Telecom* case.

II. GRANT OF THE WAIVER REQUEST WOULD BE IN THE PUBLIC INTEREST

Grant of the requested waiver would be in the public interest, because it would permit the influx of significant new capital, as well as access to the technical and operational experience of Point Broadband and ITC, to the Sunset Digital Communications entities. In turn, these benefits should accelerate the deployment of the CAF networks that will expedite the availability of fixed broadband service in rural Tennessee and Virginia.

Point Broadband specializes in providing broadband Internet service to residential and business customers in rural and suburban American. Point Broadband is making significant investments to build state-of-the-art broadband networks to serve areas that have limited or no Internet service. ITC invests in innovative broadband, telecommunications, and other companies, including Powertel, InterCall, ITC Deltacom, Knology, and Mindspring. The financial wherewithal and operational expertise will support the CAF build-out in ways that SDC Inc., standing alone, cannot.

Further, allowing the proposed assignment of SDC Inc. to SDC LLC to be consummated prior to grant of the long-form application and final support approval will enable Point Broadband to work more closely with banking institutions and engineers to provide greater assurance to the Commission that the pre-grant commitments can be met. Point Broadband has access to capital sources that it cannot make available to support the CAF project until it controls the CAF asset. Moreover, Point Broadband cannot expend the requisite significant engineering and other resources on SDC Inc.'s CAF opportunity absent its ability to make ultimate decisions on network planning, budgeting, operations and a host of other tasks that, given build-out milestones, must be in process very soon.

By contrast, requiring the parties to wait until after CAF funding is approved will likely delay that ultimate decision, delay access to additional funding needed for build-out, and delay network planning and operational decisions. Where, as here, the Commission was aware of the transaction before the short-form was filed and the ITC and Point Broadband principals "have demonstrated their qualifications for bidding,"¹⁸ the public interest and past Bureau decisions support grant of the requested waiver. In this regard, the "purpose of Auction 903 – identifying the set of qualified applicants that are willing and able to compete to provide service in the eligible areas"¹⁹ – was satisfied.

¹⁸ *Hawaiian Telcom* at 4-5

¹⁹ *Id.* at 4.

Conclusion

The facts of this case justify waiver under decisions the Bureaus have previously made with respect to Auction 903. The Bureaus therefore should waive the Major Modification Rule to the extent set forth herein.

Respectfully submitted,

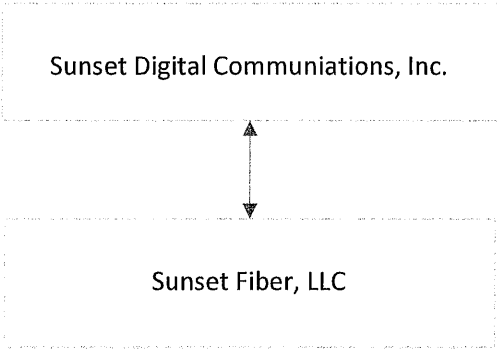
**SUNSET DIGITAL COMMUNICATIONS,
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November 26, 2018

Exhibit A

Pre- Closing Chart



Closing Chart

