

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	AU Docket No. 14-252
SAL SPECTRUM, LLC)	GN Docket No. 12-268
)	File Number 0007122225

To: The Wireless Telecommunications Bureau

REPLY COMMENTS REGARDING PETITION FOR WAIVER

Atlantic Tele-Network, Inc. (“ATN”) and its wholly-owned subsidiary SAL Spectrum, LLC (“SAL”) (together “Petitioners”) hereby submit reply comments regarding their Petition for Waiver (“Petition”).¹ Many parties have filed letters in support of the Petition, including leaders of Tribal organizations and state and local government officials serving rural areas.² Only one opposing comment was filed in response to the *Waiver Petition PN*,³ and as discussed below, that filing, made by auction competitors, does not credibly challenge the merits of Petitioners’

¹ See *Wireless Telecommunications Bureau Seeks Comment on Atlantic Tele-Network, Inc. and SAL Spectrum, LLC, Petition for Waiver to Claim Eligibility for Rural Service Provider Bidding Credit in Auction 1002*, Public Notice, DA 16-516 (rel. May 11, 2016) (“*Waiver Petition PN*”).

² See Letter from Q. Val Hale, Executive Director, Utah Governor’s Office of Economic Development, to Tom Wheeler, FCC Chairman, dated May 31, 2016 (“UT Governor’s Office of Economic Development Letter”); Letter from Linda Calhoun, Mayor, Town of Red River, NM, to Jon Wilkins, FCC WTB Chief, dated May 10, 2016 (“Red River NM Letter”); Letter from Russell Begaye, President of The Navajo Nation, to Jon Wilkins, FCC WTB Chief, dated May 12, 2016 (“Navajo Nation Letter”); Letter from Phil Lyman, Chairman, San Juan County, UT Board of Commissioners, to Jon Wilkins, FCC WTB Chief, dated May 17, 2016 (“San Juan County NM Letter”); Letter from Walter W. Haase, P.E., General Manager of the Navajo Tribal Utility Authority, to Jon Wilkins, FCC WTB Chief, dated May 17, 2016 (“NTUA Letter”); Letter from Cindy Dozier, Chair, Hinsdale County, CO Board of County Commissioners, to Jon Wilkins, FCC WTB Chief, dated May 18, 2016 (“Hinsdale County CO Letter”); Letter from Llevando Fisher, President of The Northern Cheyenne Tribe Administration, to Jon Wilkins, FCC WTB Chief, dated May 23, 2016 (“Northern Cheyenne Tribe Letter”); Letter from the Honorable LoRenzo C. Bates, Speaker, 23rd Navajo Nation Council, to Jon Wilkins, FCC WTB Chief, dated May 25, 2016 (“Navajo Nation Council Speaker Letter”); Letter from Janelle Kukuk, County Administrator, Mineral County, CO, to Jon Wilkins, FCC WTB Chief, dated May 25, 2016 (“Mineral County CO Letter”); Letter from Godfrey Enjady, President, National Tribal Telecommunications Association, to Jon Wilkins, FCC WTB Chief, dated June 2, 2016 (“NTTA Letter”).

³ See Comments of N.E. Colorado Cellular, Inc. d/b/a Viaero Wireless and Union Telephone Company d/b/a Union Wireless, filed May 26, 2016 (“Viaero/Union Comments”).

requested waiver of Section 1.2110(f)(4) of the FCC’s rules.⁴ The Petition meets the Federal Communications Commission’s (“Commission’s” or “FCC’s”) waiver standards, is consistent with FCC policy, and serves the public interest. To provide needed certainty for bidders in Auction 1002, Petitioners respectfully ask that the Wireless Telecommunications Bureau (“Bureau”) rule favorably on the Petition as soon as is practicable, but in any event in advance of the beginning of the clock phase of Auction 1002.⁵

I. The Viaero/Union Comments Misinterpret the Underlying Purposes of the Rural Service Provider Bidding Credit and Raise Issues That Need Not Be Decided in the Context of the Petition.

The Commission explicitly tailored the rural service provider bidding credit as distinct from the small business bidding credit, and the Commission specifically indicated that an applicant would have to “choose between one bidding credit and the other.”⁶ The Commission added that “[t]here is no evidence ... that smaller rural service providers face significantly unique or different challenges than larger ones” and said that “many of the service providers that are now eligible for the rural service provider bidding credit have well over \$55 million in annual revenues and thus have far greater access to capital than most small businesses.”⁷⁸

⁴ 47 C.F.R. § 1.2110(f)(4).

⁵ Though time is short, grant of the Petition in the requested time frame would be consistent with other cases in which the Bureau has ruled favorably shortly before the start of bidding on waiver requests regarding auction eligibility. See, e.g., *Request for Waiver of the Definition of ‘Federally Recognized Tribal Land’ Under Section 1.2110(F)(3)(i) of the Commission’s Rules to Include Additional Areas within the Eastern Navajo Agency of the Navajo Nation*, Order, 29 FCC Rcd 13769 (WTB Nov. 12, 2014) (waiver to expand the areas eligible for service under the Tribal lands bidding credit granted on the day before auction bidding started); *AMA Communications, LLC, Request for Waiver of Section 54.1003(b)*, 27 FCC Rcd 11084 (WTB Sept. 14, 2012) (waiver of FCC requirement for Mobility Fund auctions that applicants must have obtained any necessary FCC approvals for access to the spectrum; granted less than two weeks before the start of Auction 901).

⁶ *Report and Order; Order on Reconsideration of the First Report and Order; Third Order on Reconsideration of the Second Report and Order; Third Report and Order*, 30 FCC Rcd 7493, 7538 ¶ 108 (2015) (“*Part 1 Reform Order*”).

⁷ *Id.*

⁸ Viaero/Union Comments at 3.

Viaero/Union thus fundamentally misconstrue the point of the rural service provider bidding credit when they cite ATN's publicly reported total revenues as grounds for denying SAL access to the bidding credit. The rural service provider bidding credit seeks to promote rural service, not to address constraints on access to capital. A different rule – Section 1.2110(f)(2) – provides bidding credits for small businesses to assist them in overcoming the disadvantages in accessing capital that they face in comparison to larger entities.⁹ Financial size simply is not a factor in determining eligibility for the rural service provider bidding credit, and ATN's revenues, therefore, are irrelevant to the purpose of the rule and the waiver request.

Viaero's and Union's view of the purpose of the rule conflicts with the Commission's own statements. When the Commission adopted a 15 percent bidding credit for rural service providers, it said it sought to “better enable eligible rural service providers to compete for spectrum licenses at auction and *speed the availability of wireless voice and broadband services to rural areas*, consistent with our statutory objectives.”¹⁰ In other words, the rural service provider bidding credit seeks to address the demonstrated fact that rural service providers “face obstacles to wireless deployment that are more challenging in their service areas,” the evidence for which is confirmed by “their inability to provide service that competes with larger providers in rural areas.”¹¹ The Commission created the rural service provider bidding credit to allow service providers that focus on deployment of facilities in rural areas, such as ATN, to more effectively compete against larger providers that may be less inclined to prioritize rural needs and interests. Grant of the requested waiver would serve this goal.

⁹ See 47 C.F.R. § 1.2110(f)(2).

¹⁰ *Report and Order; Order on Reconsideration of the First Report and Order; Third Order on Reconsideration of the Second Report and Order; Third Report and Order*, 30 FCC Rcd 7493, 7531 ¶ 91 (2015) (emphasis added), citing 47 U.S.C. § 309(j)(3)(A)-(B) (“*Part 1 Reform Order*”).

¹¹ *Id.*

Viaero and Union note that the rule does not state that “foreign affiliates or their subscribers should be excluded.”¹² Neither, however, does the rule state that subscribers served by foreign affiliates should be counted despite the requirement of current service to “predominantly rural areas” (defined to include only areas in the U.S.). This inherent ambiguity is irrelevant to the Petition in any event, because the waiver request does not require the Bureau to resolve the question of whether the subscriber threshold should be read to include foreign subscribers. The Petition asks only that the Bureau find that, in this case, the standard for a waiver of any such requirement has been met.¹³

Favorable disposition of ATN’s narrow and factually unique petition for waiver would not require the Commission to “also allow other American carriers to affiliate with other large foreign carriers to take advantage of the discount,” as Viaero and Union claim.¹⁴ ATN’s Petition seeks only a determination, based on its particular circumstances, as to SAL’s ability to claim eligibility for the rural service provider bidding credit in Auction 1002. In any event, as shown below, there is no “slippery slope” here – indeed, there is no slope at all, because the circumstances presented by this requested waiver are unique in Auction 1002.

¹² Viaero/Union Comments at 2.

¹³ The Commission may wish to resolve this ambiguity before the next auction in which the rural service provider bidding credit is made available, but contrary to the implication of the Viaero/Union Comments, the Bureau need not address this issue here. Indeed, the recent decision of the U.S. Court of Appeals for the D.C. Circuit in the *Great Lakes Comnet* case lends further support to the idea that the relevance of foreign operations in this context should be resolved before the next auction in which the rural service provider bidding credit is available. In that case, which involved rural carrier eligibility for an exemption from a tariffing requirement, the court refused to credit a Commission explanation for an eligibility decision because the basis for its decision “appears nowhere in the Commission’s order.” *Great Lakes Comnet, Inc. and Westphalia Telephone Company v. FCC*, No. 15-1064, slip op. at 10 (D.C. Cir. May 24, 2016).

¹⁴ Viaero/Union Comments at 3.

II. The Requested Waiver Satisfies the Commission’s Waiver Standards.

The order adopting the rural service provider bidding credit made clear that the benefit was intended for service providers “that provide commercial communications services to a customer base of fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers and serve primarily rural areas.”¹⁵ As discussed in the Petition, by defining “rural areas” only with respect to the population density of “counties,” Section 1.2110(f)(4) appears to be concerned only with service provided, and subscribers served, within the United States for determinations of eligibility for the credit.¹⁶ Petitioners do not, however, seek a clarification from the Commission on that question at this time. Instead, the given the nearness of bidding in the clock phase of Auction 1002, the Petition asks that even if one were to interpret Section 1.2110(f)(4) to require consideration of service to subscribers in other countries, a waiver of that requirement is warranted in this case. The Petition and these reply comments demonstrate that the standards for making such a ruling are met here, and the Viaero/Union Comments do nothing to undercut that simple fact.

Section 1.925(b)(3) of the FCC’s rules sets forth two alternative bases on which the Bureau may waive a Commission rule:

“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

¹⁵ *Part 1 Reform Order*, 29 FCC Rcd at 7530 ¶ 88.

¹⁶ Somewhat nonsensically, Viaero and Union seem to suggest that, to confirm a bidder’s eligibility for the rural service provider bidding credit, the FCC must analyze the rural nature of service areas outside of the U.S. Viaero/Union Comments at 4. It seems obvious that the “county” metric set forth in the rule would be inapplicable in other countries. Consistent with the Petition and to the extent necessary, Petitioners ask that the Bureau make clear that the requested waiver includes a rejection of the interpretation urged by Viaero and Union.

- (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.”¹⁷

The circumstances presented here satisfy each of these two alternative standards.

A. The underlying purposes of the rural service provider bidding credit would be frustrated in this case if service to subscribers in foreign countries were considered relevant, and grant of the requested waiver would be in the public interest.

The rural service provider bidding credit seeks to encourage the deployment of competitive and innovative services in rural areas and competition in auctions among a diversity of service providers. ATN’s record of commitment to service in rural America is unquestioned, and the record in this proceeding reflects that commitment.¹⁸ As just one example, the recent deployment of service by ATN subsidiary Commnet Wireless to the 125 residents of the small ranching community of Grouse Creek, Utah, has “enhanced public safety access, greater economic opportunities, and the convenience of mobile services” for the first time.¹⁹ ATN’s “commitment to serve the Navajo Nation” is similarly lauded by the President of the Navajo Nation, who has stated that this commitment “has improved the quality of life for countless individuals and is essential to the economic development of our communities.”²⁰ These and other examples of ATN’s commitment to service to rural America demonstrate that the underlying purposes of the

¹⁷ 47 C.F.R. § 1.925(b)(3). Another formulation of the standard is that a rule waiver is appropriate if “special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.” *Northeast Cellular Tel. Co. v FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁸ Examples of ATN’s rural service commitment can be found in supporting letters filed by leaders in rural America. See UT Governor’s Office of Economic Development Letter; Red River NM Mayor Letter; San Juan County NM Letter; Hinsdale County CO Letter; Mineral County CO Letter.

¹⁹ See UT Governor’s Office of Economic Development Letter at 1.

²⁰ See Navajo Nation Letter at 1.

rule would be frustrated if the Bureau denies ATN the ability to claim eligibility for the rural service provider bidding credit.

Furthermore, unless it has the ability to claim eligibility for the rural service provider bidding credit, ATN would be placed at an immediate disadvantage in the auction vis-à-vis other rural service providers, such as Viaero and Union, and also larger carriers whose financial capabilities dwarf ATN's. And as shown by the bidding in the most recent auction in which ATN and SAL participated (Auction 73), SAL needs the rural service provider bidding credit in order to compete effectively.²¹

SAL participated in Auction 73 without the benefit of any bidding credit, made a \$10 million upfront payment, placed bids on a total of 128 licenses, and committed more than \$20 million in capital to its auction bids in a single round. In the end, however, SAL won only five licenses in Auction 73, and its winning bids totaled less than \$3 million. SAL simply could not compete with AT&T and Verizon (which won 37 of the licenses on which SAL had placed bids) or with small businesses that had the benefit of a bidding credit (which won 70 of the licenses on which SAL had placed bids).²² If SAL had been eligible for a 15 percent bidding credit in Auction 73, it would have been able to place bids exceeding the ultimate winning bids on 25 more licenses than it actually won, and still make the same financial commitment to each license. Put another way, with a 15

²¹ Petitioners cannot disclose any more information regarding SAL's Auction 1002 bidding strategy without risking violation of the Commission's rule against prohibited communications, 47 C.F.R. § 1.2105(c).

²² Put another way, other than the five licenses won by SAL in Auction 73, winning bids were received from an entity other than AT&T, Verizon, or a bidder with a small business bidding credit, on only 17 of the 128 licenses on which SAL had placed bids in Auction 73. (One license ultimately went unsold.)

percent bidding credit in Auction 73, SAL may have been in a position to win 30 licenses instead of only five.²³

Therefore, the goals of the rural service provider bidding credit – fostering deployment of service in rural America from a diverse group of service providers and promoting competition in this auction – would be dealt a blow if Section 1.2110(f)(4) were to be applied as Viaero and Union suggest. Conversely, grant of the waiver would help make the auction more competitive in rural areas, fostering increased competition in those areas where few competitive options currently exist. Similarly, the increased competition in Auction 1002 that would result from grant of the requested waiver would likely increase auction revenues (making a successful incentive auction more likely) and serve the public interest.

B. The unique or unusual factual circumstances presented would make it inequitable and contrary to the public interest to deny the Petition.

The circumstances giving rise to the Petition are unique, which provides a separate but equally compelling justification for grant of the requested waiver. The FCC has found that 99 applicants have filed “complete” applications to participate in Auction 1002.²⁴ Of these 99 applicants, 29 have claimed eligibility for the rural service provider bidding credit, 53 have claimed eligibility for a small business or very small business bidding credit, and 17 have

²³ Petitioners recognize that it is not possible to predict with certainty the actual outcomes that would have resulted in Auction 73 if a 15 percent bidding credit had been available to SAL. Petitioners submit, however, that these statistics are nonetheless instructive on the issue of whether a bidder such as SAL needs the rural service provider bidding credit in order to compete effectively.

²⁴ See *99 Applications to Participate in the Forward Auction (Auction 1002) of the Broadcast Television Spectrum Incentive Auction Deemed To Be Complete*, Public Notice, DA 16-503 (rel. May 12, 2016).

claimed eligibility for neither bidding credit.²⁵ A review of publicly available information regarding these applications reveals that:

- None of the other 28 Auction 1002 applicants that have claimed eligibility for the rural service provider bidding credit through their service to “predominantly rural areas” in the U.S. also has significant international operations;²⁶ and
- All of the 17 Auction 1002 applicants that did not claim eligibility for a bidding credit appear to be ineligible for the rural service provider bidding credit, either because they clearly do not serve predominantly rural areas, serve more than 250,000 domestic subscribers, or are not currently engaged in service provision at all.

Thus, as the only Auction 1002 bidder with domestic affiliates serving predominantly rural areas and foreign affiliates serving a significant number of subscribers overseas, SAL is uniquely situated in Auction 1002. The areas served by SAL’s domestic affiliates are not only predominantly rural; as demonstrated in the letters filed in support of the Petition, its affiliate Commnet Wireless frequently provides the only wireless service in rural communities and remote areas, offering a lifeline to those who need it.²⁷ Indeed, an important part of ATN’s wireless business is the provision of services in approximately 100 areas like these, where other carriers holding spectrum licenses have declined, or failed, to build out. Approximately 90 percent of Commnet Wireless cell sites are located in counties with a population density of less than 50 persons per square mile, approximately two-thirds are located in counties with a population density of less than 25 persons per square mile, and nearly ten percent are located in counties with a population density of one person or less per square mile.

²⁵ *Id.* at Attachment A.

²⁶ Limitless Mobile appears to provide service to a small number of subscribers in other countries. Significantly, Limitless Mobile has not opposed grant of the requested waiver.

²⁷ *See, e.g.*, San Juan County UT Letter (“Commnet Wireless was the first company to deploy cellular communications in our market.”); Mineral County CO Letter (detailing Commnet Wireless efforts to build new facilities to aid firefighters); Red River NM Letter (“ATN was the first company to cellular and data services in our market.”); Hinsdale County CO Letter (“ATN’s commitment to serve our market has improved the quality of life for countless individuals and is essential to the economic development of our community.”).

Commnet Wireless's service in Tribal areas demonstrates a particularly unique component of ATN's commitment to serving underserved rural and remote areas. Commnet Wireless provides wireless coverage to more than 27,000 square miles of Tribal land, including more than 75 percent of the land area on 20 Tribal reservations, and more than 50 percent of the land area on five more. On these 25 Tribal reservations, the average population density is a mere 2.39 persons per square mile – less than one-fortieth the minimum threshold of 100 persons per square mile under the Commission's definition of "rural area." When it adopted the tribal lands bidding credit for use in spectrum auctions in 2000, the FCC noted the "substantial need for specific incentives targeted to the deployment of service on tribal lands" and found that it has "a duty to do all that we can to ensure that access to services on tribal lands is increased well beyond current levels."²⁸ ATN's willingness and its unique efforts to accept this duty further supports grant of the requested waiver.²⁹

ATN has introduced to many rural and remote areas the first digital wireless services capable of carrying broadband data (or the first competitive services in areas previously served by a sole provider). These services offer critical connections for Americans who are too often left out or left behind, and in some cases can mean the difference between life and death.³⁰ To expand these needed services, and indeed to deploy more advanced 4G technology in these underserved areas, more spectrum is needed. The 600 MHz Band offers the best opportunity (and perhaps the only opportunity for the foreseeable future) for ATN to expand and improve the

²⁸ *Extending Wireless Telecommunications Services To Tribal Lands*, 15 FCC Rcd 11794, 11798 ¶¶ 8, 10 (2000).

²⁹ As noted above, several tribal leaders and organizations have expressed support for the Petition. *See* Navajo Nation Letter; NTUA Letter; Northern Cheyenne Tribe Letter; Navajo Nation Council Speaker Letter; and NTTA Letter.

³⁰ Examples of instances in which ATN facilities were critical in protecting lives and property are detailed in Exhibit 1 to the Petition.

innovative services it has been deploying in rural America for decades. Without the requested waiver, that opportunity would be jeopardized, to the detriment of the public interest.

Finally, in light of all the facts and circumstances presented here, simple fairness dictates that the requested waiver be granted. SAL's domestic affiliates serve fewer than 63,000 subscribers. Nine Auction 1002 applicants that are claiming eligibility for the rural service provider bidding credit serve more domestic subscribers, with three serving more than double that number. As set out in the Petition, the nature of ATN's foreign subscribers is such that ATN cannot leverage them to gain an advantage in the U.S. wireless marketplace, or for that matter, in Auction 1002. To ensure a level playing field with other rural service providers, the Bureau should afford SAL the ability to claim eligibility for the rural service provider bidding credit on an equal footing with its auction competitors.

ATN acted diligently in preparing its Auction 1002 application and it did not anticipate that the Bureau might interpret Section 1.2110(f)(4) to include the overseas operations of an auction applicant's affiliates. This interpretation, supported by Viaero and Union, appears nowhere in the *Part 1 Reform Order*. The *Part 1 Reform Order* does not state that subscribers served by an auction applicant's foreign affiliates must be attributed to that applicant, and the assessment of a service provider's "predominantly rural" status refers specifically to "counties," which could only be relevant on U.S. territory. The order does not include the word "foreign," and the record on which the Commission based the 250,000 subscriber threshold does not support the notion that the Commission intended to include foreign subscribers.³¹ The plain

³¹ None of the comments in the Part 1 reform rulemaking proceeding suggested that the Commission exclude from bidding credit eligibility those applicants whose foreign affiliates serve subscribers in excess of the threshold.

language of the rule, therefore, at a minimum supports the notion that ATN’s interpretation in SAL’s short-form application was not unreasonable.³²

In light of the newness of the rural service provider bidding credit, the ambiguity inherent in it, and the unusual circumstances presented here, it would be inequitable for the Bureau to deny the requested waiver.³³

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³² *Accord Great Lakes Comnet, Inc. and Westphalia Telephone Company v. FCC*, No. 15-1064, slip op. (D.C. Cir. May 24, 2016).

³³ Grant of the Petition would be consistent with the Bureau’s action in the case of Cross Wireless, a Mobility Fund auction applicant that had not received formal designation as an eligible telecommunications carrier prior to the short-form application deadline for that auction. See *Cross Wireless, LLC Waiver of Section 54.1003(a) of the Commission’s Rules*, Order, 28 FCC Rcd 12849 (WTB Sept. 11, 2013) (waiver justified in part because “the forms and procedures for [the auction] were new to applicants,” and Cross Wireless “exercised adequate diligence in the auction process”).

III. Conclusion

A waiver of Commission rules may be granted when doing so would serve the public interest and would not undermine the policy served by the rule.³⁴ The Petition presents just such a case, and Petitioners respectfully submit that the standards for a waiver grant are met in this case and request that, to the extent that Section 1.2110(f)(4) could be read to include consideration of service provided, and subscribers served, in foreign countries, the Bureau grant a waiver of that requirement for SAL's participation in Auction 1002. Petitioners also request that the Petition be granted as soon as is practicable, but in any event, before the start of bidding in the clock phase of Auction 1002.

Respectfully submitted,

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³⁴ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).