

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

In re	)	
	)	
Native Network, Inc.	)	AU Docket No. 20-34
SmartSky Networks, L.L.C.	)	
Affinity Technology Solutions LLC	)	
Elektrafi LLC	)	
Little Miami Gig LLC	)	
	)	
Request for Waiver of Deadline for Filing Short- Form Application to Participate in Auction 904 (FCC Form 183)	)	

**ORDER**

**Adopted: September 1, 2020**

**Released: September 1, 2020**

By the Chief, Auctions Division, Office of Economics and Analytics:

**I. INTRODUCTION**

1. In this Order, we resolve five requests for waiver of the deadline for filing a short-form application to participate in Auction 904, filed by Native Network, Inc. (Native Network); SmartSky Networks, L.L.C. (SmartSky); Affinity Technology Solutions LLC (ATS); Elektrafi LLC (Elektrafi); and Little Miami Gig LLC (LMG) (each separately a Petitioner and collectively Petitioners). Petitioners did not file the required short-form applications before the deadline. Each now independently seeks a waiver so that it may submit an untimely application to participate in Auction 904 and join the auction process. For the reasons set forth below, we deny each request for waiver.

**II. BACKGROUND**

2. The Commission's competitive bidding rules provide that a party seeking to participate in an auction for universal service support such as Auction 904 must provide specified information according to procedures announced by public notice.<sup>1</sup> Those rules expressly state that "no untimely applications shall be reviewed or considered."<sup>2</sup> The rules further underscore that an "applicant will not be permitted to participate in competitive bidding if the application . . . does not include all required certifications, as of the deadline for submitting applications."<sup>3</sup>

3. On June 11, 2020, the Commission released a Public Notice establishing application and bidding procedures for the Rural Digital Opportunity Fund Phase I Auction (Auction 904).<sup>4</sup> The Commission announced that the window for electronically filing the required short-form application to

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<sup>1</sup> 47 CFR § 1.21001(a) and (b).

<sup>2</sup> 47 CFR § 1.21001(d)(1).

<sup>3</sup> 47 CFR § 1.21001(d)(2).

<sup>4</sup> See *Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020; Notice and Filing Requirements and Other Procedures for Auction 904*, Public Notice, 35 FCC Rcd 6077 (2020) (*Auction 904 Procedures Public Notice*).

participate in Auction 904 (FCC Form 183) would open three weeks later at 12:00 noon Eastern Daylight Time (EDT) on July 1, 2020, and close at 6:00 p.m. EDT on July 15, 2020.<sup>5</sup> The *Auction 904 Procedures Public Notice* announced that bidding in the auction will begin on October 29, 2020.<sup>6</sup>

4. In addition to announcing important dates and deadlines for the auction, the *Auctions 904 Procedures Public Notice* called attention to the relevant rules, cautioning that “[l]ate applications will not be accepted” and that “[a]pplicants are strongly encouraged to file early and in advance of the deadline. Applicants are responsible for allowing adequate time for filing their applications. . . . An applicant must always click on the CERTIFY & SUBMIT button on the ‘Certify & Submit’ screen to successfully submit its FCC Form 183 and any modifications; otherwise, the application or changes to the application will not be received or reviewed by Commission staff.”<sup>7</sup> The *Auction 904 Procedures Public Notice* provided contact information for applicants requiring technical assistance in the same paragraph that provided this strong encouragement. The separate instructions for completing the Auction 904 short-form application likewise emphasized the significance of the deadline, noting in the second paragraph that “**Applications must be submitted and confirmed prior to 6:00 p.m. EDT on July 15, 2020.** . . . Late applications or unconfirmed submissions will **not** be accepted.”<sup>8</sup>

5. The *Auction 904 Procedures Public Notice* also explained that applicants are responsible for providing more information in the short-form application than a statement of interest or intent to participate. Specifically, the Public Notice stated, “[a]mong other things, an applicant must submit operational and financial information demonstrating that it can meet the public interest obligations associated with the [service] performance tier and latency combination(s) for which it intends to bid.”<sup>9</sup> Moreover, “[a]n applicant bears full responsibility for submitting an accurate, complete, and timely short-form application.” The Public Notice referred applicants to various resources to assist with questions about how to meet this responsibility, affirmatively noting that, “if the applicant needs additional information or guidance concerning the [described] disclosure requirements, the applicant should review the educational materials for Auction 904 and/or use the contact information provided in this Public Notice to consult with Commission staff well in advance of the application deadline.”<sup>10</sup> A significant component of a completed application is an applicant’s certification of the information submitted. Accordingly:

Each applicant must make a series of certifications under penalty of perjury on its FCC Form 183 related to the information provided in its application and its participation in the auction, and each applicant must confirm that it is legally, technically, financially, and otherwise qualified to receive Rural Digital Opportunity Fund support. If an Auction 904 applicant fails to make the required certifications in its FCC Form 183 by the filing deadline, its application will be deemed unacceptable for filing and cannot be corrected after the filing deadline.<sup>11</sup>

6. Once applications are filed, the Commission proceeds to review and assess the submitted information to maintain the announced auction timeline. As explained in the *Auction 904 Procedures Public Notice*, “[a]fter the deadline for filing auction applications, the Commission will process all timely

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<sup>5</sup> *Id.* at 6082, para. 12.

<sup>6</sup> *Id.*

<sup>7</sup> *Auction 904 Procedures Public Notice* at 6143, paras. 195-97.

<sup>8</sup> *FCC Form 183; Application to Participate in Rural Digital Opportunity Fund Phase I Auction; Auction 904; Instructions* at p.1 <https://www.fcc.gov/file/18946/download> (emphasis in original).

<sup>9</sup> *Auction 904 Procedures Public Notice* at 6089, para. 28.

<sup>10</sup> *Id.* at 6089, para. 29.

<sup>11</sup> *Id.* at 6089, para. 30.

submitted applications to determine whether each applicant has complied with the applications requirement and provided all information concerning its qualifications for bidding, and subsequently will issue a public notice with applicants' initial application status[.]”<sup>12</sup>

7. Each of the Petitioners failed to submit a short-form application to participate in Auction 904 prior to the 6:00 p.m. EDT close of the window on July 15, 2020, and each subsequently filed a request that the deadline for filing be waived.<sup>13</sup>

8. On July 16, 2020, Native Network filed a request for a waiver of the short-form application deadline, asserting that its Chief Operating Officer attempted to finish its application on July 15, 2020, but “was delayed by access and password issues and couldn’t get logged on until 4:15 PT, [and] therefore was unable to finish before the deadline 3:00 PT[.]”<sup>14</sup> Native Network asserts that it “entered 95% of the necessary data in to FCC Form 183” on July 9, 2020.<sup>15</sup> However, it only subsequently attempted to add required “technical information from engineering personnel,” that was not available earlier “due to state and national stay at home orders associated with COVID-19 since early April.”<sup>16</sup> Native Network notes that in recent months, also due to COVID-19, its “small organization has been working 12-14 hour[] days under tight timeframes and limited resources to ensure student[]s and businesspeople can learn and work from home.”<sup>17</sup>

9. On July 19, 2020, SmartSky filed a request pursuant to sections 1.3 and 1.925 of the Commission’s rules for “waiver of the requirement that short-form applications be filed no later than 6:00 p.m. EDT on July 15, 2020[.]”<sup>18</sup> It states that, though it had uploaded much of the information needed for the short-form application on July 14, 2020, a day before the deadline, “SmartSky’s efforts were thwarted by a combination of technical impediments that, starting at 3:44 p.m. on July 15, 2020, and continuing through the 6:00 p.m. filing deadline, prevented SmartSky from completing the filing.”<sup>19</sup> SmartSky states that it “does not know what the reason for these technical difficulties was and has no reason to believe that they arose from SmartSky’s system.”<sup>20</sup> Specifically, SmartSky asserts that “[w]ith approximately five minutes remaining, SmartSky attempted to certify the application and submit it. . . . The system was

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<sup>12</sup> *Id.* at 6143, para. 198.

<sup>13</sup> See Petition for Waiver of FCC Auction 904 Form 183 Deadline, Native Network, Inc. FRN 0024000473 (July 16, 2020) (*Native Network Request*); Petition for Waiver of SmartSky Networks, L.L.C. (July 19, 2020) (*SmartSky Request*); Request for Waiver of Form 183 Application Deadline; Rural Digital Opportunity Fund (“RDOF”) Phase 1 – Auction 904 (July 20, 2020) (*ATS Request*); Request for Waiver of Auction 904 Short Form Filing Deadline; Waiver-Expedited Action Requested; Elektrafi LLC; FRN: 0029531852 (July 21, 2020) (*Elektrafi Request*); Petition for Waiver of Little Miami Gig LLC (July 31, 2020) (*LMG Request*).

<sup>14</sup> *Native Network Request* at 2.

<sup>15</sup> *Id.* at 1.

<sup>16</sup> *Id.* at 1-2.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *SmartSky Request* at 1.

<sup>19</sup> *Id.* More specifically, these asserted technical difficulties “included the automatic addition by the system of unknown files not originating from SmartSky when SmartSky tried to upload its ownership information at that time (3:44 p.m.); an apparent continuous virus scan that kept SmartSky’s ownership information (as well as the additional files that had not been contributed by SmartSky) from being uploaded; a “spinning” symbol apparently resulting from the continuing virus scan; and a resulting inability to complete any other part of the application. These difficulties persisted despite the numerous attempts, more than 30, by SmartSky to complete the filing between 3:44 p.m. and 6:00 p.m.” *Id.* at 1-2.

<sup>20</sup> *Id.* at 2.

frozen and completely unresponsive, preventing SmartSky from submitting and certifying the Form 183.”<sup>21</sup>

10. ATS filed a request on July 20, 2020, that the Commission find good cause pursuant to section 1.3 of the Commission’s rules to waive “the Auction 904 short-form filing deadline to permit ATS to upload the final attachment to and certify its short-form application.”<sup>22</sup> ATS states that it learned of the auction only on July 14, 2020, the day before the deadline for filing the short-form application.<sup>23</sup> When it then attempted to apply in the remaining time available, ATS “encountered numerous delays uploading and scanning its attachments. Nevertheless, ATS asserts that it had completed the body of the short-form application and uploaded all but the final attachment when the FCC’s Auction Application System timed out shortly before the application deadline.”<sup>24</sup> Though ATS logged back in “the application deadline struck before it could upload its [final] attachment.”<sup>25</sup>

11. Elektrafi filed a request on July 21, 2020, for a waiver pursuant to section 1.925 of the Commission’s rules “to permit the Company to submit a Short-Form Application to participate in the Rural Digital Opportunity Fund (‘RDOF’) auction after the Short-Form application deadline.”<sup>26</sup> Elektrafi contends that it “attempted to submit the application to the Commission approximately five minutes before the 6 pm Eastern deadline on Wednesday, July 15, 2020”<sup>27</sup> and “[t]he only reason the Short-Form application was not submitted before the deadline is because of an issue with the Commission’s auction portal.”<sup>28</sup>

12. Finally, on July 31, 2020, LMG filed a petition for waiver of the Commission’s prohibition on untimely applications. LMG stated that it “has been and still is undergoing hardships directly related to the COVID-19 pandemic.”<sup>29</sup> LMG cites to Commission actions that allowed additional time to meet specified deadlines due to the pandemic.<sup>30</sup> According to LMG, COVID-19 in Ohio prevented timely filing of its application because it “created undue hardship on Company’s already lean staff.”<sup>31</sup>

### III. DISCUSSION

13. The Commission may waive its rules for good cause.<sup>32</sup> Petitioners seek relief from the deadline generally and under standards for waiver articulated in sections 1.3 and 1.925 of the Commission

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<sup>21</sup> *Id.* at 6.

<sup>22</sup> *ATS Request* at 1.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Elektrafi Request* at 1.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 3.

<sup>29</sup> *LMG Request* at 1.

<sup>30</sup> *Id.* at 9 and n.38.

<sup>31</sup> *Id.* at 11. LMG attributes its small staff to its adherence to “Lean Management techniques designed to produce value for its customers through the optimization of resources, continuous improvement and elimination of waste in all aspects of the business operations,” which requires LMG to “operate[ ] with a streamlined staff and management structure.” *Id.* at 2.

<sup>32</sup> *See* 47 CFR § 1.3.

rules.<sup>33</sup> Section 1.3 of the Commission's rules governs the waiver requests here, because section 1.925 applies only to wireless radio services applications and competitive bidding for spectrum licenses.<sup>34</sup> As such, we will construe all of the waiver applications as seeking review pursuant to section 1.3. Court decisions have emphasized that finding good cause for waiver of the Commission's rules depends on finding both that: (1) a deviation from the general rule serves the public interest; and (2) special circumstances warrant the deviation sought.<sup>35</sup> For the reasons described below, we find that each of the Petitioners has failed to demonstrate good cause to receive a waiver, and we therefore deny each request.

14. None of the Petitioners has met the essential requirement of showing that waiving the deadline will serve the public interest. The Commission noted in the Order adopting the Rural Digital Opportunity Fund that “[u]tilizing an auction mechanism will allow us to distribute support consistent with our policy goals and priorities in a transparent manner.”<sup>36</sup> Encouraging competition in Auction 904, and confidence in its ultimate assignment of up to \$16 billion in support over 10 years, depends upon fair and equal treatment of all applicants, including subjecting them all to the same publicly announced deadlines for auction-related actions. Enforcing the deadline, not waiving it, is fundamental to the public interest in an effective auction mechanism for distributing universal service support.

15. As the Commission observed last year when affirming denial of a short-form application deadline waiver in Auction 101, it “has consistently explained that uniform deadlines for various stages of the auction application process provide applicants with certainty and give the Commission time for orderly application review and auction preparation.[] The underlying purpose of rules establishing deadlines is best served by their consistent application, which serves the public interest by providing fair and equal treatment to applicants by subjecting them to the same timeframes for making auction-related decisions.”<sup>37</sup>

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<sup>33</sup> See generally, *Native Network Request* (not citing any Commission rule or case); *SmartSky Request* at 1 (waiver request pursuant to Commission rule Sections 1.3 and 1.925); *ATS Request* at 2 (citing Section 1.3 and related case law); *Elektrafi Request* at 1 (Section 1.925); *LMG Request* at 1 (Section 1.3).

<sup>34</sup> See *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999) (noting virtual identity of material provisions of general waiver standard and standard in specific Commission rule provisions that were later incorporated into section 1.925).

<sup>35</sup> See *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969), *cert. denied*, 93 S.Ct. 461 (1972)) (*Northeast Cellular*).

<sup>36</sup> *Rural Digital Opportunity Fund; Connect America Fund*, Order, 35 FCC Rcd 686, 695, para. 18 (2020) (*Order*).

<sup>37</sup> *NBVDs Investment, L.L.C., Request for Waiver of Section 1.2105 of the Commission's Rules for Auction 101*, Memorandum Opinion and Order, 34 FCC Rcd 8507, 8509, para. 11 (2019) (*NBVDs AFR MO&O*) (citing *First Auction of Interactive Video and Data Service (IVDS) Licenses: Request for Waiver of Applications Deadline*, Memorandum Opinion and Order, 11 FCC Rcd 1134 (1996) (Commission decision affirming denial of waiver of short-form filing deadline and emphasizing importance of strictly enforcing deadlines), *affirming First Auction of Interactive Video and Data Service (IVDS) Licenses: Request for Waiver of Applications Deadline*, Order, 10 FCC Rcd 5415 (WTB 1995); *Vero Beach Broadcasting, LLC – Request for Waiver of Short-Form Deadline for FM Broadcast Auction No. 62*, Letter Order, 20 FCC Rcd 19346 (WTB 2005) (*Vero Beach*) (short-form deadline provides reasonable certainty to applicants of fair and predictable application of auction rules and procedures, including enforcement of deadlines; deadlines allow applicants to plan for auction and a deadline waiver would undermine Commission's ability to review short-form applications in timely manner because it would encourage similar requests); *Ideas for Business, Inc. – Request for Waiver of Short-Form Deadline for FM Broadcast Auction No. 37*, Letter Order, 19 FCC Rcd 20517, 20517-19 (WTB 2004) (*Ideas for Business*) (denying waiver request when short-form application was not timely submitted due to an alleged “break in the transmission”)); see also *Request for Extensions of Time To File a Short-Form Application and Submit Down Payment in Auction No. 59*, Letter Order, 20 FCC Rcd 8750 (WTB 2005); *Request for Waiver of Short-Form Deadline for Auction No. 44*, Letter Order, 17 FCC Rcd 16301 (WTB 2002)).

16. The auction process includes multiple succeeding deadlines, including application filing deadlines and deadlines at the end of each round of bidding, which must be enforced to assure that an auction is fair and objective to all participants. The deadline serves the public interest in a fair and orderly auction process notwithstanding that it prevents a would-be applicant from filing an application as it intended. Otherwise, participants could argue for exceptions based on what they *meant* to do—e.g., certify and submit an application by the deadline, place a bid, etc.—rather than what they actually did in the time allotted to all participants equally.<sup>38</sup> For these reasons, the Commission advises applicants that they must take responsibility for their own action or inaction in the auction process.<sup>39</sup> As already noted, the Commission “strongly encourage[s] [applicants] to file early and in advance of the deadline.”<sup>40</sup>

17. Speculative claims that the public interest might be served by waiving the deadline are insufficient to show good cause for a waiver when considered alongside the public interest served by enforcement. Petitioners assert that if the requested waiver is granted, they may qualify to bid, they might win the bidding in Auction 904, they could become authorized to receive universal service support, and the service that they then should provide would serve the public interest.<sup>41</sup> These speculative attempts to justify a waiver would undermine any auction deadline and simply ignore clear precedent. Just last year, the Commission noted that arguments regarding how a would-be auction applicant’s potential service might further the public interest “could be asserted whenever an auction deadline is missed. For that reason, the Commission has routinely rejected such arguments in declining to grant other requests for waiver of its competitive bidding rules[.]”<sup>42</sup>

18. In this regard, the competitive bidding process for universal service support here is no different than the Commission’s competitive bidding for wireless licenses in these prior cases. Enforcing publicly announced deadlines in a fair and consistent manner serves the public interest by ensuring the effectiveness of the Commission’s competitive bidding, building confidence, enhancing competition, and achieving robust results. Contrary to Petitioners’ suggestion, waiving the short-form filing deadline solely based upon the possibility that a would-be applicant would become a winning bidder and receive support for providing the required services does not outweigh the larger public interest in an effective auction process in which all applicants are required to meet the same filing deadlines.

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<sup>38</sup> See *Elektrafi Request* at 1 (“Elektrafi intends to participate in the [Rural Digital Opportunities Fund] auction.”)

<sup>39</sup> In the parallel context of submitting bids in the Commission’s Auction System, the Commission declared that it will have no obligation to resolve issues that arise “outside the Auction System or [are] attributable to a bidder, including, but not limited to, a bidder’s hardware, software, or Internet access problem that prevents the bidder from submitting a bid prior to the end of a round,” on behalf of a bidder. See *Auction 904 Procedures Public Notice* at 6145, para. 207.

<sup>40</sup> *Auction 904 Procedures Public Notice* at 6143, para. 196.

<sup>41</sup> See *Native Network Request* at 1; *SmartSky Request* at 8-9; *ATS Request* at 3; *Elektrafi Request* at 1; *LMG Request* at 10-11.

<sup>42</sup> *NBVDs AFR MO&O* at 8511, para. 15 (citing *Application of The ERIE Radio Co., LLC for a Construction Permit for a New FM Broadcast Station at Westfield, NY; Informal Request for Extension of Time*, Memorandum Opinion and Order, 32 FCC Rcd 3890, 3896 & n.51, para. 17 (MB/WTB 2017) (rejecting argument that waiver was in the public interest because re-auctioning construction permit would cause a multi-year delay in a local broadcaster serving Westfield, NY); *Southern Communications Systems, Inc.*, Second Memorandum Opinion and Order, 16 FCC Rcd 18357, 18361, para. 9 (2001) (“[E]nforcing the Commission’s payment rules . . . serves the public interest better than relying on the wholly unsubstantiated possibility that [petitioner] might have provided service in its license area sooner than the successor licensees will.”); and *Aircom Consultants, Inc.*, Order on Reconsideration, 18 FCC Rcd 1806, 1810-11, paras. 12-13 (WTB 2003) (following Commission precedent in rejecting the petitioner’s argument that the down payment and default rules should be waived to provide communications services to underserved tribal lands and rural areas)).

19. Separate from their inability to show that a waiver would serve the public interest, the Petitioners do not demonstrate special circumstances that could justify departing from the general rule.<sup>43</sup> Native Networks cites the “extraordinary circumstances related to our COVID-19 unusual operating conditions.”<sup>44</sup> Though Native Networks mentions unusual operational conditions prevailing in April, it does not explain why those conditions kept it from obtaining all the necessary information on a more timely basis in July, more than two months later, particularly given that it did obtain what it says was 95% of the necessary information by July 9.<sup>45</sup> Rather than operational difficulties, SmartSky focuses on the substantial effect that COVID-19 had on its business roll-out generally and “the resultant timing of its short-form application submittal.”<sup>46</sup> ATS admits that it learned from a consultant that the auction might be of interest on July 14, the day before the application deadline.<sup>47</sup> Elektrafi does not offer any particular explanation for why it did not attempt to file its application prior to the last minute.<sup>48</sup> LMG makes no claim that it even attempted to file an application prior to the deadline.<sup>49</sup>

20. None of Petitioners’ circumstances render enforcing the deadline unfair or inequitable or otherwise justify departing from its standard enforcement. Prior to announcing the application window, the Commission sought comment on a range of proposed auction procedures.<sup>50</sup> One comment in response suggested postponing the auction several months in light of the ongoing COVID-19 pandemic.<sup>51</sup> The Commission declined to do so, noting that the pandemic heightened the public interest in providing all Americans “access as soon as possible to high-speed broadband to telework, attend online classes, communicate with family and friends, and obtain healthcare remotely.”<sup>52</sup> The Commission also noted that a wide variety of commenters affirmatively opposed any delay and urged the Commission to proceed with the auction as scheduled.<sup>53</sup> Furthermore, applicants other than the Petitioners met the deadline while addressing the constraints the pandemic imposed on their operations. It would be inequitable to excuse a Petitioner’s failure to meet the deadline due to the same circumstances. Certainly, ATS cannot be excused from complying with a deadline publicly announced more than a month earlier simply because ATS only began acting upon it in the last two days before the deadline. Elektrafi offers no explanation for waiting until the last minute to complete and attempt to file its application. And LMG does not describe any attempt to meet the publicly announced deadline.

21. LMG cites five deadline extensions announced in March and April in response to the pandemic.<sup>54</sup> These extensions are no basis for waiving the July 15, 2020 short-form application deadline

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<sup>43</sup> This second requirement is essential. A public interest showing alone cannot suffice to waive a strict deadline, which by its nature effectively excludes otherwise meritorious claims which may be in the public interest to consider. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

<sup>44</sup> *Native Network Request* at 1.

<sup>45</sup> *See Native Networks Request* at 1-2.

<sup>46</sup> *SmartSky Request* at 3.

<sup>47</sup> *ATS Request* at 1.

<sup>48</sup> *See, generally, Elektrafi Request.*

<sup>49</sup> *See, generally, LMG Request.*

<sup>50</sup> *Comment Sought on Competitive Bidding Procedures and Certain Program Requirements for the Rural Digital Opportunity Fund Auction (Auction 904)*, Public Notice, 35 FCC Rcd 2295 (2020) (*Auction 904 Comment Public Notice*).

<sup>51</sup> *Auction 904 Procedures Public Notice* at 6082, para. 13.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *LMG Request* at 9, n.38.

established in the *Auction 904 Procedures Public Notice* on June 11, 2020, more than a month before the deadline. The cited orders were released between March 13 and April 2 and extended deadlines originally set prior to the pandemic.<sup>55</sup> As such, they were responses to emergent circumstances. In contrast, the *Auction 904 Procedures Public Notice* established the short-form application deadline more than two months after the last of these extensions, and only after declining a suggestion that the auction be delayed due to the pandemic. In addition, as noted in the *Auction 904 Procedures Public Notice*, other parties responding to the suggestion affirmatively opposed any delay.<sup>56</sup> Prior actions extending deadlines that were established before the pandemic simply are not persuasive precedents for extending the Auction 904 short-form application deadline.

22. Each Petitioner other than LMG further contends that it should be excused from meeting the deadline due to technical filing difficulties, with the earliest first encountering impediments with just over two hours remaining in the two-week long filing window and others within the last few minutes.<sup>57</sup> As the Commission observed when declining to waive the Auction 101 short-form deadline, a would-be applicant that waits until the last five minutes “of the two-week filing window to attempt to certify and submit its short-form application . . . assumed the risk that the certification and submission of the application would not be completed within the next five minutes. Five minutes can in no way be considered a ‘reasonable margin of error,’ particularly when the short-form application filing window was open for two weeks.”<sup>58</sup> SmartSky describes final efforts to file that began less than two and half hours before the close of a filing window that was open for over three hundred hours. SmartSky’s margin of error, while more than five minutes, was not so much more that it can justify deviating from standard enforcement of the deadline. This is precisely why the Commission strongly encourages applicants to file early.

23. Moreover, internal staff review has not identified any problem with the Commission’s application system that precluded an applicant from submitting and certifying an application up to the close of the application window. SmartSky and, to a lesser extent, ATS both attempt to detail technical difficulties each encountered. SmartSky describes “the automatic addition by the system of unknown files . . . an apparent continuous virus scan that kept [files] . . . from being uploaded; a “spinning” symbol apparently resulting from the continuing virus scan; and a resulting inability to complete any other part of the application . . . despite the numerous attempts, more than 30, by SmartSky to complete the filing between 3:44 p.m. and 6:00 p.m.”<sup>59</sup> ATS references “repeated delays uploading and scanning its attachments.”<sup>60</sup> These assertions do not establish that it was the Commission’s application system rather than Petitioners’ connections or systems or user error that was the cause of their problems. Accordingly, Petitioners bear responsibility for the delays they encountered, not the Commission.<sup>61</sup>

24. Notwithstanding the repeated cautions, admonitions and encouragements of the Commission, before the filing window closed none of the Petitioners sought assistance from the

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<sup>55</sup> *See id.*

<sup>56</sup> *Auction 904 Procedures Public Notice* at 6082, para. 13.

<sup>57</sup> *See SmartSky Request* at 1.

<sup>58</sup> *NBVDs AFR MO&O* at 8513, para. 20.

<sup>59</sup> *See, SmartSky Request* at 1-2.

<sup>60</sup> *ATS Request* at 1. Other Petitioners are even more vague. *See Native Network Request* at 2 (representative logged on an hour and a quarter after the deadline due to untimed “access and password issues”); *Elektrafi* at 1 (in the last five minutes before the deadline, the “Commission’s portal was unavailable”).

<sup>61</sup> *See Auction 904 Procedures Public Notice* at 6145, para. 207 (bid results will not be altered after the deadline for placing bids based on any technical difficulties that a bidder may have encountered, absent evidence of a failure in the Commission’s bidding system).



Commission staff with any purported technical difficulties, or even brought them to the staff's attention.<sup>62</sup> The Petitioners' failure to contact Commission staff ruled out any possibility that Commission assistance would have helped to resolve problems encountered in the last few minutes. In fact, the system did not require uploads of attachments to be completed before certifying and submitting the application.

25. Each petitioner other than LMG also asserts that the deadline should be waived given the status of its application prior to the deadline.<sup>63</sup> Native Networks asserts that its application was 95 percent complete on July 9, nearly a week prior to the application deadline. SmartSky argues that it essentially met the deadline, at least as well as any applicant that might subsequently amend its application.<sup>64</sup> ATS and Elektrafi also both contend that they effectively had completed their applications prior to the deadline. ATS provides with its waiver request a copy of the only attachment it was unable to upload and claims that it "should be able to complete and certify its application almost instantly" upon accessing it.<sup>65</sup> Elektrafi goes further and asserts that "the Short-Form application should be saved in the [Rural Digital Opportunity Fund] auction portal and the Commission need only accept the application as it was completed by the Company prior to the Short-Form deadline," although it nonetheless includes a document it seeks to submit as a short-form attachment with its waiver request.<sup>66</sup> SmartSky and Elektrafi contend that completing materials on file with the Commission prior to the deadline amounts to little more than a what would be a permissible minor amendment that an applicant with a timely filed application might make.<sup>67</sup>

26. These arguments overlook the clear requirements for applicants at the short-form application deadline. Elektrafi cites the Commission's *Rural Digital Opportunity Fund Order* to suggest that the Commission prioritizes auction participation over collecting and reviewing information in the short-form application.<sup>68</sup> Elektrafi ignores the Commission's decisions in the same *Order* "declin[ing] to collect less financial and technical information from existing USF support recipients on the short-form than we did in CAF Phase II as suggested by some commenters. It is important for Commission staff to review the same specific information from each carrier when evaluating carriers' qualifications to bid."<sup>69</sup> Thus, in the *Rural Digital Opportunity Fund Order*, the Commission found that the short-form application struck an appropriate balance between placing requirements on would-be applicants and encouraging auction participation, not that facilitating auction participation outweighed the need for timely short-form applications. Would-be applicants that almost complete their applications do not

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<sup>62</sup> See, generally, *Native Networks Request*, *SmartSky Request*, *ATS Request*, *Elektrafi Request*, *LMG Request*. Indeed, LMG makes no claim of even attempting to file let alone communicate with staff before the deadline. See, generally, *LMG Request*. As noted above, LMG did not attempt to file an application prior to the deadline, so it cannot make this argument.

<sup>63</sup> As noted above, LMG did not attempt to file an application prior to the deadline, so it cannot make this argument.

<sup>64</sup> *SmartSky Request* at 9 ("there are uploads that need to be completed, a few additional questions to be answered, and a 'submit' button that needs to be hit again.")

<sup>65</sup> *ATS Request* at 3.

<sup>66</sup> *Elektrafi Request* at 2 and n.5 (describing attachment). We note that Elektrafi requested that information submitted in the attachment be kept confidential pursuant to Commission rule 0.457. The Commission provided for an expedited process for requesting confidential treatment of financial information submitted as part of FCC Form 183. *Procedures Public Notice* at paras. 142-45; see also 47 CFR § 0.459(a)(4). Though Elektrafi does not provide the full information normally required as part of a request for confidential treatment, see 47 CFR § 0.459(b), we recognize that it has made this submission as an attempted part of submitting an FCC Form 183. We therefore considered it as having made the expedited request provided for with respect to FCC Form 183 and will keep the information confidential, pending any request for its release. See 47 CFR § 0.459(a)(4).

<sup>67</sup> *Elektrafi Request* at 1; *SmartSky Request* at 9.

<sup>68</sup> *Elektrafi Request* at 2 (citing *Rural Digital Opportunity Fund Order* at 721, para. 78).

<sup>69</sup> *Rural Digital Opportunity Fund Order* at 720-21, para. 77.

enable “Commission staff to review the same specific information from each carrier when evaluating carriers’ qualifications to bid”<sup>70</sup> and therefore do not justify a deviation from standard enforcement of the deadline.

27. Significantly, notwithstanding the information that they input on their unsubmitted applications, none of the Petitioners that attempted to apply took the final step of certifying and submitting their applications prior to the deadline. Certification is essential to commit applicants to the auction process and its governing rules.<sup>71</sup> The significance of these commitments is reflected in the fact that the certifications in a timely-filed application cannot be modified after the short-form filing deadline. As already noted, the Commission’s rules expressly provide that an applicant will not be permitted to participate in the competitive bidding if the application does not include all required certifications as of the deadline for submitting applications. Moreover, the rules governing modifications provide that an “applicant may not make major modifications to its application after the deadline for submitting applications. . . . Major modifications include . . . *any changes* in the required certifications.”<sup>72</sup> Regardless of the quantity of the information each Petitioner offered to the Commission prior to the short-form application deadline, none of them had certified its accuracy or that the applicant was “in compliance with all statutory and regulatory requirements for the universal service support that the applicant seeks[.]”<sup>73</sup> Consequently, none of the information provided merited review along with applications that had been so certified.

28. In addition, contrary to the arguments of SmartSky and ATS, we do not find that any prior waivers of other deadlines are reason to waive this deadline here. SmartSky contends that a post-auction long-form application deadline waiver demonstrates that its requested short-form application deadline should be waived.<sup>74</sup> Winning bidders file long form applications after the close of the auction and any delay by one applicant in filing does not necessarily have any consequences for the processing of other applications. When it rejected an attempt to rely on precisely the same precedent last year and instead affirmed denial of a waiver for a short-form application, the Commission stated that “[t]he instant matter involves a pre-bidding auction application deadline where the consequences of delays in fully investigating and resolving such a claim potentially risk prejudice to all auction applicants and the public. Notably, [petitioner] fails to cite a single precedent in which the Commission granted a waiver of a pre-auction short-form application deadline.”<sup>75</sup>

29. ATS similarly argues that Auction 903 waivers of the rule barring major modifications of an application support granting it a waiver of the short-form application here. ATS is incorrect. The Auction 903 decision explicitly noted that “the requested waivers will not undermine the purposes of the rule prohibiting major modifications and there is a stronger public interest benefit in granting the waivers than in applying the rule.”<sup>76</sup> Specifically, waiving the bar on major modifications did not undermine the purposes of that rule “because petitioners disclosed their future real parties-in-interest prior to the short-form deadline . . . and included relevant information on their post-transaction ownership in their short-

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<sup>70</sup> *Id.*

<sup>71</sup> See 47 CFR § 1.21001(b)(4)-(8), listing certifications required in all short-form applications to participate in competitive bidding for universal service support.

<sup>72</sup> 47 CFR § 1.21001(d)(4) (emphasis added).

<sup>73</sup> See 47 CFR. § 1.21001(b)(6) (required certification).

<sup>74</sup> *SmartSky Request* at 10-11 (citing *Application of Metricom, Inc.*, 12 FCC Rcd 15157, 15159, para. 6 (WTB Commercial Wireless Div. 1997 (*Metricom*))).

<sup>75</sup> *NBVDs AFR MO&O* at 8513, para. 18 (distinguishing *Metricom*).

<sup>76</sup> *Petition of Hawaiian Telcom, Inc. and Cincinnati Bell Inc. for Expedited Waiver of Section 1.21001(d)(4) of the Commission’s Rules; Request of Horizon Telcom, Inc. for Waiver of Section 1.21001(d)(4) of the Commission’s Rules*, Order, 33 FCC Rcd 6208, 6211, para. 9 (WCB/WTB 2018).

form applications.”<sup>77</sup> This is not a compelling precedent for granting the requested waiver to ATS or any of the Petitioners. None of the Petitioners completed and certified their applications prior to the short-form deadline. As detailed above, the public interest in a fair and uniform application of the deadline outweighs any public interest in the speculative service that might be result from permitting these would-be applicants to participate in Auction 904 and the waiver sought here would undermine the express purpose of the short-form application deadline.

30. In summary, each Petitioner had just as much of an opportunity to file their application as any other applicant, even if some Petitioners found themselves unable to do so in the final hours or last minutes of the application window. The public interest in a fair auction will be served by continuing to uniformly enforce the deadline for short-form applications and none of the Petitioners present special circumstances that justify departing from this practice.

#### IV. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309, and sections 0.21(m), 0.271 and 1.3 of the Commission’s rules, 47 CFR §§ 0.21(m), 0.271 and 1.3, that Native Network’s Request, dated July 16, 2020; SmartSky’s Request, dated July 19, 2020; ATS’s Request, dated July 20, 2020; Elektrafi’s Request, dated July 21, 2020; and LMG’s Request, dated July 31, 2020, are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jonathan M. Campbell  
Chief, Auctions Division  
Office of Economics and Analytics

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<sup>77</sup> *Id.*