

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18A-0681T

IN THE MATTER OF THE APPLICATION OF INVENTIVE WIRELESS, LLC
D/B/A VISTABEAM FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS
CARRIER IN THE STATE OF COLORADO.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY
GRANTING AMENDED APPLICATION SUBJECT TO CONDITIONS
AND CLOSING PROCEEDING**

Mailed Date: January 11, 2019

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I. STATEMENT**A. Summary**

1. This Decision addresses the Amended Application for Designation as an Eligible Telecommunications Carrier in the State of Colorado (Amended Application) filed by Inventive Wireless, LLC, doing business as Vistabeam (Vistabeam) on December 5, 2018. For the reasons stated below, the Amended Application is granted subject to the conditions specified below.

B. Background

2. On October 2, 2018, Vistabeam filed an Application for Designation as an Eligible Telecommunications Carrier in the State of Colorado (Application).

3. In its Application, Vistabeam stated that it was a winning bidder in the Federal Communications Commission's (FCC's) Connect America Fund Phase II Auction (Auction 903) (the CAF II Auction) to provide voice and broadband services in certain areas in Colorado defined by census blocks that lack these services. Vistabeam states that it will provide its voice service using voice over internet protocol (VoIP) technology. Winning bidders in the CAF II Auction must obtain eligible telecommunications carrier (ETC) status in the state in which the carrier will provide service. State Commissions are authorized under Article 47 U.S.C. § 214(e) to designate a company as an ETC if that company meets state and federal requirements as an ETC. Rules 2187 and 2002(b) of the Commission's Rules Regulating Telecommunications Services and Providers of Telecommunications Services sets out requirements for ETC designation.¹

¹ 4 Code of Colorado Regulations (CCR) 723-2.

4. On October 2, 2018, the Commission issued notice of the Application and providing 30 days for interested persons to intervene.

5. On October 18, 2018, Vistabeam filed a Supplement to the Application that provided “the underlying carrier’s exchange area map displaying the applicant’s service area,” as required by Commission Rule 2187(d)(II), and a two-year buildout plan.

6. On October 23, 2018, the Commission filed a deficiency letter dated October 4, 2018 requesting the additional information provided by Vistabeam on October 18, 2018.

7. On November 2, 2018, Staff filed a Motion for Intervention by Right and Request for Hearing (Intervention). In its Intervention, Staff requested a hearing, but did not state that it opposes the Application. Instead, Staff stated that it “will raise and address any and all issues which, after investigation and analysis, are likely to assist the Commission to render its decision on” the Application.²

8. On November 7, 2018 the Commission deemed the Application complete and referred the proceeding to an Administrative Law Judge (ALJ). The proceeding was subsequently assigned to the undersigned ALJ.

9. On November 16, 2018, the undersigned Administrative Law Judge issued Decision No. R18-1032-I scheduling a joint prehearing conference for November 28, 2018 at 1:00 p.m. Because the issues raised in this proceeding and Proceeding Nos. 18A-0666T and 18A-0703T are similar and Staff is the intervenor in all three proceedings, the ALJ made the prehearing conference a joint prehearing conference held in this proceeding and in Proceeding

² Intervention at 1 (¶ 2).

Nos. 18A-0666T and 18A-0703T for the sake of efficiency. In Decision No. R18-1032-I, the ALJ also instructed Staff to be prepared to describe in detail its position with respect to the Applications and why it requested a hearing on them. The ALJ also instructed the parties to be prepared to schedule hearings in Proceeding Nos. 18A-0666T, 18A-0681T, and 18A-0703T during the week of December 17, 2018.

10. On November 28, 2018, the ALJ conducted the joint prehearing conference. Attorneys for all of the parties attended and stated that they had reached an agreement in principle that would resolve this proceeding. Vistabeam agreed to file by December 7, 2018 an additional amendment to its Application and Vistabeam presented an oral unopposed motion at the prehearing conference to grant leave to Vistabeam to amend the Application, which the ALJ granted. Staff agreed to withdraw its intervention if the amendment was consistent with their agreement.

11. On December 3, 2018, the ALJ issued Decision No. R18-1075-I that scheduled the hearing in this proceeding for December 19, 2018. Decision No. R18-1075-I also established the deadline of December 7, 2018 for: (a) Vistabeam to file the amendment to the Application discussed at the prehearing conference; and (b) Staff to file either: (i) its withdrawal of its intervention based on its support for the Application, as amended on December 7, 2018; or (ii) a stipulated procedural schedule.

12. On December 5, 2018, Vistabeam filed its Amended Application. In its Amended Application, Vistabeam: (a) provided greater detail on the measures it takes, and will take, to

supply backup power to its tower sites in the event of a commercial power outage;³ (b) clarified that it does not require customers to sign a term contract for VoIP services;⁴ (c) stated that it will submit an informational filing in advance of any changes to its rates or plans;⁵ (d) stated that it will copy the Commission on all filings Vistabeam makes with respect to CAF II compliance;⁶ (e) committed to collecting and paying the TRS, HCSM and E9-1-1 surcharges within its proposed ETC service area;⁷ and (f) provided a map of the geographic areas in which Vistabeam will receive CAF II support and will be an ETC.⁸

13. Also on December 5, 2018, Staff filed its Notice of Withdrawal of its Intervention in this Proceeding. In that filing, Staff stated that it is withdrawing its intervention based on the Amended Application. Staff requested that the Amended Application be approved, which would render unnecessary the hearing that was scheduled for December 20, 2018. Staff further requested that the decision approving the Amended Application “explicitly recognize[] and reaffirm[] Vistabeam’s ongoing obligation to adhere to the amendments that caused Staff to withdraw its intervention.”⁹

14. On December 11, 2018, the ALJ issued Decision No. R18-1118-I that vacated the hearing scheduled for December 19, 2018 based on the filings on December 5, 2018.

³ Notice of Filing Amended Application at 1 (¶ 1); Amended Application at 13-14.

⁴ Notice of Filing Amended Application at 1 (¶ 2); Amended Application at 12.

⁵ Notice of Filing Amended Application at 1 (¶ 3); Amended Application at 14.

⁶ Notice of Filing Amended Application at 2 (¶ 4); Amended Application at 14.

⁷ Notice of Filing Amended Application at 1 (¶ 5); Amended Application at 13.

⁸ Notice of Filing Amended Application at 1 (¶ 6); Amended Application at 7, Revised Exhibits. 1, 2.

⁹ Staff’s Notice of Withdrawal at 1.

C. Analysis

1. Modified Procedure

15. Because Staff's intervention has been withdrawn, the Amended Application is unopposed. Accordingly, pursuant to § 40-6-109(5), C.R.S. and Commission Rule 1403,¹⁰ the Amended Application will be considered under the modified procedure, without a formal hearing.

2. Overview of Federal Law Governing Universal Service and Support

16. Since 1996, the Federal Communications Commission (FCC) has provided subsidies (known as federal universal service support), and imposed obligations on the recipients thereof, to provide landline service to underserved areas.¹¹ Pursuant to the system put in place at that time, only ETCs designated by a state Public Utilities Commission could receive federal universal service support.¹² From 1996 to 2011, the "universal service" eligible for support was limited to landline-based telephonic service.¹³

17. In recognition of the evolving importance of access to the Internet, the FCC expanded the definition of "universal service" to include broadband service in 2011. In so doing, the FCC sought to redirect federal support to "networks capable of providing voice and broadband services."¹⁴ Toward that end, the FCC created the Connect America Fund to provide "up to \$ 1.8 billion to be spent annually to make broadband-capable infrastructure available to as

¹⁰ 4 CCR 723-1.

¹¹ See *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1240 (D.C. Cir. 2018).

¹² See 47 U.S.C. §§ 214(e)(2), 254(e); *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1086 (D.C. Cir. 2012).

¹³ See *AT&T*, 886 F.3d at 1239.

¹⁴ *In re Connect Am. Fund*, 31 FCC Rcd 5949, 5952, 2016 FCC LEXIS 1807, **7 (F.C.C. May 26, 2016).

many unserved locations as possible,” and “adopted rules to apply generally for competitive bidding to award universal service support.”¹⁵ The FCC conducted “Auction 903” in July and August 2018 to allocate federal universal support for the expanded definition of “universal service” to certain underserved areas defined by “census blocks,” including some in Colorado.¹⁶

18. Notwithstanding the expansion of the federal definition of “universal service” to include broadband service, federal law continues to require a provider of “universal service” to receive an ETC designation from the public utilities commission(s) in the state(s) in which the provider has won an auction as a condition of receiving the “universal support” resulting therefrom.¹⁷

3. Federal Requirements for ETC Designation

19. In order to be designated as a Federal ETC under the Federal Act, a provider must establish that it will: (a) provide the supported services throughout its designated service areas “either using its own facilities or a combination of its own facilities and resale of another carrier's services;”¹⁸ (b) advertise its universal service offerings and the charges thereof, using media of general distribution;¹⁹ (c) comply with the service requirements applicable to the

¹⁵ *Id.*

¹⁶ See *Connect America Fund Phase II Auction (Auction 903) Closes; Winning Bidders Announced; FCC form 683 Due October 15, 2018*, AU Docket No. 17-182, WC Docket No. 10-90, Public Notice DA 18-887, 2018 FCC LEXIS 2237 (released August 28, 2018) (Auction 903 Results Notice).

¹⁷ 47 U.S.C. § 214(e)(2).

¹⁸ 47 U.S.C. § 214(e)(1)(A); 47 *Code of Federal Regulations* (C.F.R.) § 54.201(d)(1).

¹⁹ 47 U.S.C. § 214(e)(1)(B); 47 C.F.R. § 54.201(d)(2).

support that it receives;²⁰ and (d) be able to remain functional during emergency situations, including a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations.²¹

20. In addition, as to supported voice telephony services, the provider must also provide evidence that it will provide: (e) its supported voice services as a common carrier;²² (a) voice grade access to the public switched telephone network or its functional equivalent; (b) local usage;²³ (c) access to emergency services;²⁴ and (d) toll-limitation for qualifying low-income consumers.²⁵

21. Finally, as to the supported broadband internet access services, the provider must establish that those services are capable of transmitting and receiving data, excluding dial-up service.²⁶ The FCC waived the requirements for a winning bidder to file a five-year build-out plan and to demonstrate that it will satisfy applicable consumer protection and service quality standings pursuant to 47 C.F.R. § 54.202(a)(1)(ii), (a)(3), respectively.²⁷

²⁰ 47 C.F.R. § 54.202(a)(1)(i).

²¹ 47 C.F.R. § 54.202(a)(2).

²² 47 U.S.C. § 214(e)(1); 47 C.F.R. § 54.201(d).

²³ 47 C.F.R. § 54.101(a)(1).

²⁴ *Id.*

²⁵ *Id.*

²⁶ 47 C.F.R. § 54.101(2).

²⁷ See *WCB Reminds Connect America Fund Phase II Applicants of the Process for Obtaining Federal Designation as an Eligible Telecommunications Carrier*, WC Docket Nos. 09-197, 10-90, Public Notice DA 18-714, 2018 FCC LEXIS 1751, *12 (rel. July 10, 2018) (*WCB's Reminder of Process for ETC Designation*).

22. Here, in its Amended Application, Vistabeam attests that it will provide its VoIP and broadband services throughout its designated service areas using its own facilities or a combination of its own facilities and leasing of another carrier's facilities, and advertise its universal service offerings and the charges thereof, using media of general distribution.²⁸ Vistabeam also states that it will comply with applicable consumer protection and service quality standards (including for the Cellular Telecommunications Industry Association's Consumer Code for Wireless Service),²⁹ and has the capability to remain functional during emergency situations because it maintains battery backup systems at all of its sites that are designed to maintain power for eight hours, solar panels and associated battery storage at "many of its sites . . . which, depending on weather conditions, could allow a site to run indefinitely and will operate for at least two (2) days without sunlight," and has "several emergency generators to augment its solar/battery backup systems as needed."³⁰ Vistabeam also has redundancy in terms of routing traffic and the capability to manage data spikes resulting from emergency situations.³¹

23. As to its voice services, Vistabeam attests in the Amended Application that it will provide unlimited voice grade access to the public switched telephone network that will include unlimited access to emergency services, and toll-limitation services for qualifying low-income

²⁸ Amended Application at 9-10.

²⁹ *Id.* at 11, 14.

³⁰ *Id.* at 13-14.

³¹ *Id.*

consumers.³² Vistabeam also states that it will provide its wireless telecommunications services as a common carrier.³³

24. Finally, Vistabeam attests in its Amended Application that its facilities will provide the capability to transmit and receive voice and data traffic over the Internet.³⁴

25. Accordingly, Vistabeam has satisfied its burden of establishing the requirements for ETC designation under 47 U.S.C. § 214(e) and 47 C.F.R. §§ 54.101(a), 54.201(d), 54.202(a).

4. Colorado Requirements for ETC Designation

26. As noted above, Rule 2187 of the Commission's Rules Regulating Telecommunications Services and Providers of Telecommunications Services sets out requirements for ETC designation.³⁵ Rule 2187 requires an applicant for ETC designation to: (a) provide a description of the service area for which the applicant seeks designation as an ETC either by metes and bounds or the underlying carrier's exchange area map;³⁶ (b) establish that it meets the requirements of 47 CFR §§ 54.201(d), 54.202;³⁷ (c) affirm that it is a common carrier, will advertise the services and associated charges, make Lifeline available in all locations where it has been awarded support, and that it is in compliance with applicable Commission rules;³⁸

³² *Id.*

³³ *Id.* at 12.

³⁴ *Id.* at 9-10.

³⁵ 4 CCR 723-2.

³⁶ Rule 2187(d)(II), 4 CCR 723-2.

³⁷ Rule 2187(d)(III-IV), 4 CCR 723-2.

³⁸ Rule 2187(d)(V-VIII), 4 CCR 723-2.

(d) establish that it will remain functional in emergency situations;³⁹ (e) satisfy consumer protection and service quality standards;⁴⁰ and (f) provide a two-year build-out plan.⁴¹

27. Here, as noted above, Vistabeam's Amended Application establishes the requirements of 47 C.F.R §§ 54.201(d), 54.202. In its Amended Application, Vistabeam also attests that it will provide its wireless telecommunications services as a common carrier,⁴² offer Lifeline in all locations where it has been awarded CAF II support,⁴³ remain functional during emergency situations,⁴⁴ satisfy consumer protection and service quality standards,⁴⁵ and comply with all applicable Commission rules.⁴⁶ As to the requirement in Rule 2187(d)(XI) to provide a two-year build-out plan, because the FCC has waived its corresponding requirement to provide a five-year build-out plan, the Commission's requirement is waived.⁴⁷ The requirement in Rule 2187(d)(II) to describe the service area "by metes and bounds or the underlying carrier's exchange area map" is similarly waived given that the FCC requires winning bidders in

³⁹ Rule 2187(d)(IX), 4 CCR 723-2.

⁴⁰ Rule 2187(d)(X), 4 CCR 723-2.

⁴¹ Rule 2187(d)(XI), 4 CCR 723-2.

⁴² Amended Application at 12.

⁴³ *Id.* at 13.

⁴⁴ *Id.* at 13-14.

⁴⁵ *Id.* at 11, 14.

⁴⁶ *Id.* at 13.

⁴⁷ See *WCB's Reminder of Process for ETC Designation*, 2018 FCC LEXIS 1751, *12. See also Decision No. C18-1094 issued in Proceeding No. 18A-0665T on December 10, 2018 at 8 (¶ 27) (waiving requirement in Rule 2187(d)(XI) for a two-year build-out plan based on the FCC's waiver of its corresponding five-year build-out plan).

Auction 902 to be designated as an ETC in the census blocks for which it will receive CAF II funding.⁴⁸

⁴⁸ See *In re Connect Am. Fund*, 31 FCC Rcd 5949, 5951, 2016 FCC LEXIS 1807, **4 (F.C.C. May 26, 2016) (“in this Order, we . . . express our preference . . . for setting the minimum biddable unit as a census block containing any eligible census blocks”); Auction 903 Results Notice, 2018 FCC LEXIS 2237, *11-12 (setting a deadline for winning bidders to inform the FCC about “[w]hether the applicant has already been designated as an eligible telecommunications carrier (ETC) for all the eligible census blocks in a winning bid(s)”). See also Decision No. C18-1094 issued in Proceeding No. 18A-0665T on December 10, 2018 at 7 (¶¶ 21, 26(a)) (waiving requirement in Rule 2187(d)(II) based on the FCC’s requirement that ETC designations based on the award of CAF II funding be made on a census block basis).

28. Accordingly, the ALJ finds that granting the Amended Application and designating Vistabeam as an ETC is in the public interest. The Amended Application shall be granted, but subject to the following conditions:

- a) Vistabeam must not require customers to sign a term contract for voice services;
- b) Vistabeam must pay Colorado's Telecommunications Relay Service, E911, and High Cost Support mechanism surcharges during the duration of its ETC designation;
- c) Vistabeam must comply with state and federal ETC reporting and certification obligations, including those required for CAF II support, and must provide copies of these federal reports to the Commission; and
- d) Vistabeam must notify the Commission 20 days prior to its initial offering and/or offering any new services or making any changes in its service plans through an informational filing with the Director of the Commission; the filing must detail the rates and speeds, as well as the terms and conditions, associated with the initial plans and any new plans.

II. ORDER

A. The Commission Orders That:

1. The Amended Application filed on December 5, 2018, by Inventive Wireless, LLC, doing business as Vistabeam (Vistabeam) requesting designation as an Eligible Telecommunications Carrier (ETC) in the State of Colorado for the purpose of receiving federal Connect America Fund Phase II (CAF II) funding is granted, subject to the following conditions:

- a) Vistabeam must not require customers to sign a term contract for voice services;
- b) Vistabeam must pay Colorado's Telecommunications Relay Service, E911, and High Cost Support mechanism surcharges during the duration of its ETC designation;
- c) Vistabeam must comply with state and federal ETC reporting and certification obligations, including those required for CAF II support, and must provide copies of these federal reports to the Commission; and
- d) Vistabeam must notify the Commission 20 days prior to its initial offering and/or offering any new services or making any changes in its service plans through an informational filing with the Director of the Commission; the filing must detail

the rates and speeds, as well as the terms and conditions, associated with the initial plans and any new plans.

2. Proceeding No. 18A-0681T is closed.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion within 20 days after service, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director