

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

In the Matter of)
Vermont Telephone Company, Inc.) File No.: EB-IHD-13-000106541
Participant in Auction No. 86) NAL/Acct. No.: 201232080004
) FRN: 0005209374
)

FORFEITURE ORDER

Adopted: December 22, 2014

Released: December 23, 2014

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. We impose a penalty of \$25,000 against Vermont Telephone Company, Inc. (VTel) for failing to submit accurate gross revenue information to the Commission in connection with the bidding credit it received through its participation as a Designated Entity in Auction No. 86.

2. The Communications Act (the Act) requires that when the Commission prescribes regulations for competitive bidding, it shall "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of . . . bidding preferences." At the same time, the Act requires the Commission to "prevent unjust enrichment as a result of the methods employed to issue licenses . . ." The Commission has recognized that the uniform and accurate reporting of gross revenues is an "essential element" of identifying small businesses that are eligible for bidding credits.

3. VTel has urged us to cancel the proposed forfeiture based on: (i) its asserted and mistaken belief that the gross revenues at issue in this case were not attributable to VTel under the Commission's rules (Rules) and (ii) its contention that, even if the revenues in question were required to be disclosed, VTel had a reasonable basis for believing its filings were correct and that the omission was not material. After reviewing VTel's response to the NAL, we find no reason to cancel, withdraw, or

1 The investigation was initiated under EB-11-IH-0734 and subsequently assigned File No. EB-IHD-13-00010654. Any future correspondence with the Commission concerning this matter should reflect the new case number.

2 47 U.S.C. § 309(j)(4)(D).

3 47 U.S.C. § 309(j)(4)(E). See generally Updating Part 1 Competitive Bidding Rules, et al., Notice of Proposed Rulemaking, 26 FCC Rcd 12426, 12428, para. 3 (2014).

4 See Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, et al., WT Docket No. 97-82, et al., Third Report and Order and Second Further Notice of Proposed Rule Making, 13 FCC Rcd 374, 390, para. 22 (1998).

5 See Vermont Telephone Company, Inc., Response to Notice of Apparent Liability at 1 (Nov. 14, 2011) (on file in EB-IHD-13-00010654) (NAL Response).

reduce the proposed \$25,000 penalty for willfully and repeatedly violating Section 1.17 of the Rules⁶ but we do cancel the proposed \$9,000 penalty for VTel's apparent violation of Section 1.65 of the Rules.⁷

II. BACKGROUND

4. VTel was a winning bidder for three Broadband Radio Service (BRS) licenses in Auction No. 86. On its "short-form" application to participate in the auction (FCC Form 175), VTel claimed status as a small business entity and sought a 15 percent bidding credit on any licenses it won in the auction. Pursuant to Section 1.2110 of the Rules, it was required to disclose, for each of the three years preceding the auction, the gross revenues of each of the following entities: (1) the applicant, (2) its affiliates, (3) its controlling interests, (4) the affiliates of its controlling interests, and (5) the entities with which it has an attributable material relationship.⁸ Successful small business auction participants were also required to provide the required detailed financial information after the auction on their post-auction "long-form" license application (FCC Form 601).

5. On November 20, 2009, VTel filed its post-auction "long-form" application.⁹ In VTel's Ownership Report, which it was required to file separately in March 2009, Dr. J. Michel Guité was identified as an officer, director, and an owner of VTel.¹⁰ The Ownership Report also identified Dr. Walter Hewlett as one of VTel's controlling interest holders based on his status as an individual major shareholder of the company and his role as Trustee of the Guité Family Trust, another major shareholder in VTel.¹¹ In its long-form application, as initially filed, VTel represented that Dr. Hewlett had no gross revenues for each of the three years preceding the auction (2006, 2007, and 2008).

6. On October 14, 2011, the Bureau issued a Notice of Apparent Liability for Forfeiture (*NAL*) against VTel in the amount of \$34,000 for its apparent willful and repeated violation of Sections 1.17 and 1.65 of the Rules,¹² for respectively failing to submit accurate revenue information to the Commission and failing to maintain the continuing accuracy of its application in connection with its participation in Auction No. 86.¹³ Specifically, the Bureau found that VTel had failed to report Dr. Hewlett's gross revenues as required by the Rules.

7. On November 14, 2011, VTel filed a response to the *NAL* requesting that "the Commission not impose the proposed forfeiture of \$34,000" based on VTel's belief at the time its

⁶ 47 C.F.R. § 1.17.

⁷ 47 C.F.R. § 1.65.

⁸ 47 C.F.R. §§ 1.2110(b)(1)(i), 1.2110(b)(3)(iv)(B). *See also Amendment of Part 1 of the Commission's Rules—Competitive Bidding*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, FCC 00-274, 15 FCC Rcd 15293, 15323-27 (2000) (subsequent history omitted).

⁹ *See* Form 601, File No. 0004040603 (filed Nov. 20, 2009).

¹⁰ *See* Form 602, File No. 0003937211 (filed Mar. 31, 2009).

¹¹ *See id.* VTel submitted an additional Ownership Report after the close of Auction No. 86. *See* Form 602, File No. 0004129864 (filed Feb. 18, 2010).

¹² *See Vermont Telephone Co., Inc.* Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 14130 (Enf. Bur. 2011) (*NAL*). Section 1.17 of the Rules states that no person may provide, in any written statement of fact, "material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading." *See* 47 C.F.R. § 1.17(a)(2). Section 1.65 of the Rules provides that "[e]ach applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application." *See* 47 C.F.R. § 1.65(a).

¹³ *See NAL*, 26 FCC Rcd at 14130, para. 1.

application was filed that the gross revenues in question were not attributable to VTel under the Rules.¹⁴ VTel further contends that even if the revenues in question were required to be disclosed, VTel had a reasonable basis for believing its filings were correct, and that the omission of the revenue information was not material and ultimately did not affect its receipt of a bidding credit.¹⁵ After the issuance of the *NAL*, the Bureau and VTel engaged in extensive settlement negotiations, but were unable to reach an agreement.

III. DISCUSSION

8. The Commission proposed a forfeiture in this case in accordance with Section 503(b) of the Act,¹⁶ Section 1.80 of the Rules,¹⁷ and the Commission's *Forfeiture Policy Statement*.¹⁸ When we assess forfeitures, the Act requires that we take into account the "nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁹ As discussed below, we have fully considered VTel's *NAL* Response in light of these statutory factors and find no basis for a complete cancellation of the proposed forfeiture. In this Forfeiture Order, we conclude that VTel willfully and repeatedly violated Section 1.17 of the Rules²⁰ by failing to submit accurate revenue information to the Commission in connection with its participation in Auction No. 86. As discussed below, however, we also cancel the *NAL*'s proposed forfeiture with respect to the apparent violation of Section 1.65 of the Rules.²¹

9. Section 1.17 of the Rules requires parties to submit factual information to the Commission that is truthful and accurate.²² In the *NAL*, the Bureau found that VTel was obligated under Section 1.17 to disclose Dr. Hewlett's revenues and that it failed to do so accurately when it listed Dr. Hewlett's revenues for the period in question as zero on its Form 601.²³

10. In its *NAL* Response, VTel first argues that the forfeiture proposed in the *NAL* is unlawful because the *NAL* is silent on the issue of whether VTel was legally required to disclose the gross revenues in question.²⁴ We disagree. As we noted in the *NAL*, "the Commission's designated entity rules require applicants to disclose revenues from *all* sources, without qualification, during the relevant time frame."²⁵ VTel listed Dr. Hewlett as a controlling interest holder on its long form application and therefore included him among those individuals and entities whose gross revenues were required to be

¹⁴ See *NAL* Response at 1.

¹⁵ See *id.* at 13-23.

¹⁶ 47 U.S.C. § 503(b).

¹⁷ 47 C.F.R. § 1.80.

¹⁸ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

¹⁹ 47 U.S.C. § 503(b)(2)(E).

²⁰ 47 C.F.R. § 1.17.

²¹ 47 C.F.R. § 1.65.

²² 47 C.F.R. § 1.17.

²³ See *NAL*, 26 FCC Rcd at 14133-34, paras. 9-10.

²⁴ See *NAL* Response at 11-13.

²⁵ *NAL*, 26 FCC Rcd at 14133, para. 9 (*citing* 47 C.F.R. § 1.2110(b)). See also, 47 C.F.R. § 1.2110 (o) (defining "Gross revenues").

reported.²⁶ VTel has failed to cite any authority which would raise a legitimate ambiguity about the need to report Dr. Hewlett's gross revenues. Therefore, as discussed in the *NAL*, VTel was required to disclose the revenues in question.²⁷

11. VTel also argues that, even if it was required to disclose the revenues in question, its failure to include information regarding entities with which Dr. Hewlett was associated did not constitute the omission of a material fact.²⁸ As we recognized in the *NAL*, the ultimate disclosure of Dr. Hewlett's revenues did not adversely affect VTel's entitlement to a small business bidding credit.²⁹ This fact does not, however, render the underlying information immaterial. Under our Rules, an entity's eligibility for a bidding credit is based on the gross revenues of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship.³⁰ The determination of whether an entity is eligible for a bidding credit, therefore, cannot be made without the submission of all of the required revenue information. Thus, the revenues in question were material to the determination of whether or not the Company was eligible for a bidding credit in Auction No. 86. In any event, our Rules do not permit auction applicants the flexibility to determine what information regarding gross revenue, as specified in Section 1.2110 of the Rules, may or may not be relevant to the Commission.

12. Full and accurate information concerning applicable gross revenues is necessary to meet our statutory obligation "to prevent unjust enrichment as a result of the method employed to issue licenses . . ." ³¹ The Commission has a strong interest in ensuring that our auctions are fair to all participants and that only bidders that qualify for a bidding credit are able to bid with such a preference, and we rely on auction applicants to make complete, truthful and accurate disclosures in order to properly assess the merits of an applicant's claim of entitlement to a bidding credit.³²

13. VTel further claims that it had a reasonable basis for omitting information regarding the entities associated with Dr. Hewlett.³³ We disagree. As noted above, because Dr. Hewlett was a controlling interest holder in VTel, VTel was required to disclose his gross revenues and the gross revenues of his affiliates.³⁴ Thus, if VTel or its counsel had exercised due diligence, they would have

²⁶ See File No. 0004040603 (filed Nov. 20, 2009). See also 47 C.F.R. § 1.2110(b)(1)(i) (gross revenues of, inter alia, controlling interest holders must be attributed to applicant for purposes of determining whether applicant qualifies as a small business).

²⁷ See *NAL*, 26 FCC Rcd at 14133, para. 9.

²⁸ See *NAL* Response at 13-18.

²⁹ See *NAL*, 26 FCC Rcd at 14132, para. 6.

³⁰ See 47 C.F.R. § 1.2110(b)(1)(i).

³¹ See 47 U.S.C. § 309(j)(4)(E).

³² As the Commission previously has found, a Company's "multiple failures to fulfill its disclosure obligations under Sections 1.2110 and 1.2112 raise particular concerns given the importance of maintaining the integrity of our spectrum auctions. We adopted carefully structured disclosure rules to ensure that our auctions are conducted in a fair and transparent manner and that all applicants participate on an even playing field. When auction applicants undermine our disclosure rules, such actions threaten the very foundation upon which we conduct our auctions." See *Maritime Communications/Land Mobile, LLCI*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, 26 FCC Rcd 6520, 6540, para. 49 (*Maritime HDO*).

³³ See *NAL* Response at 18-23.

³⁴ See 47 C.F.R. § 1.2110(b)(1)(i) ("An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous three years of the applicant (or licensee), its affiliates, **its controlling interests, the affiliates of its controlling interests**, and the entities with which it has an attributable material relationship.") (emphasis added).

known that they clearly were required to submit the revenues in question.

14. VTel next argues that it did not violate Section 1.65 of the Commission's Rules because the necessary factors are missing for this type of violation.³⁵ Although we find that VTel was obligated to include the revenue information for Dr. Hewlett, and thus that it did not meet its obligation under Section 1.65 to ensure the "continuing accuracy and completeness" of its pending applications, the Act does not require us to issue a forfeiture for every apparent violation we investigate.³⁶ The Commission is a regulatory agency with broad prosecutorial discretion in enforcement proceedings.³⁷ The courts have found that, as a general matter, the Commission is best positioned to weigh the benefits of pursuing an adjudication against the costs to the agency.³⁸ In this case, based on the totality of the circumstances, we find that it is unnecessary to issue a forfeiture for violation of both Section 1.17 and 1.65 of the Rules for VTel's failure to file the necessary revenue information.³⁹

IV. CONCLUSION

15. Based on the record before us and in light of the applicable statutory factors, we hereby conclude that VTel willfully and repeatedly violated Section 1.17 of the Rules⁴⁰ by failing to submit accurate revenue information to the Commission in connection with its participation in Auction No. 86. We conclude, however, that the proposed forfeiture with respect to VTel's apparent liability for violation of Section 1.65 of the Commission's Rules⁴¹ should be cancelled. We therefore assess a total forfeiture of \$25,000.

V. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311, and 1.80 of the Commission's rules,⁴² Vermont Telephone Company, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of twenty-five thousand dollars (\$25,000) for willful and repeated violation of Section 1.17 of the Commission's rules.⁴³

17. **IT IS FURTHER ORDERED** that the proposed forfeiture related to Section 1.65 of the Rules for failure to maintain the continuing accuracy of its filings with the Commission, is **CANCELLED**.

18. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's rules within thirty (30) calendar days after the release date of this Forfeiture Order.⁴⁴ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Communications Act of 1934,

³⁵ See 47 C.F.R. § 1.65; NAL Response at 32-36.

³⁶ See *In the Matter of Radio One Licenses, LLC*, Forfeiture Order, 19 FCC Rcd 23922, 23932 para. 24 (2004) (*Radio One*) (citing *Webnet Communications, Inc.*, Order of Forfeiture, 18 FCC Rcd 6870, 6877 para.14 (2003)).

³⁷ See *id.* at 23932 para. 24 (citing *In re: Notices of Apparent Liability for Forfeitures of Emery Telephone*, Memorandum Opinion and Order, 15 FCC Rcd 7181, 7186 para. 10 (1999)).

³⁸ See *id.* at 23922 (citing *New York State Dept. of Law v. F.C.C.*, 984 F.2d 1209, 1213 (D.C. Cir. 1993)).

³⁹ 47 C.F.R. §§ 1.17, 1.65

⁴⁰ 47 C.F.R. §1.17.

⁴¹ 47 C.F.R. § 1.65.

⁴² 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80.

⁴³ 47 C.F.R. §1.17.

⁴⁴ See *id.* § 1.80.

as amended.⁴⁵ Vermont Telephone Company, Inc. shall send electronic notification of payment to Gary Schonman at Gary.Schonman@fcc.gov, Pam Slipakoff at Pam.Slipakoff@fcc.gov, and Jeffrey J. Gee at Jeffrey.Gee@fcc.gov on the date said payment is made.

19. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. Vermont Telephone Company, Inc. shall send electronic notification of payment to Gary Schonman at Gary.Schonman@fcc.gov, Pam Slipakoff at Pam.Slipakoff@fcc.gov, and Jeffrey J. Gee at Jeffrey.Gee@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁴⁶ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions Vermont Telephone Company, Inc. should follow based on the form of payment it selects:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

20. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.⁴⁷ If Vermont Telephone Company, Inc. has questions regarding payment procedures, it should contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

⁴⁵ 47 U.S.C. § 504(a).

⁴⁶ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁴⁷ See 47 C.F.R. § 1.1914.

21. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent both by First Class U.S. Mail and Certified Mail, Return Receipt Requested, to Dr. J. Michel Guité, Chief Executive Officer, Vermont Telephone Company, Inc., 354 River St., Springfield, VT 05156, and its counsel Bennett L. Ross, Wiley Rein LLP, counsel to Vermont Telephone Company, Inc., 1776 K Street, N.W., Suite 800, Washington, DC 20006.

FEDERAL COMMUNICATIONS COMMISSION

Travis LeBlanc
Chief
Enforcement Bureau