

FCC MAIL SECTION

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

FCC 95-59

In the Matter of) WT Docket No. 95-26
)
Commercial Realty St. Pete, Inc., James C.)
Hartley, Teresa Hartley, and Ralph E.)
Howe)

ORDER TO SHOW CAUSE

Adopted: February 15, 1995

Released: February 16, 1995

By the Commission:

I. INTRODUCTION

1. On August 30, 1994, the Commission initiated a non-public investigation of the conduct of applicants in the Interactive Video and Data Services (IVDS)¹ to determine whether any misconduct in the auctions occurred.² The Commission's investigation involved, inter alia, Commercial Realty St. Pete Inc. (Commercial Realty) and its principals. Based upon the record developed thus far in that investigation, we are initiating the instant proceeding for Commercial Realty and its principals, James C. Hartley, Teresa Hartley, and Ralph E. Howe, to show cause why they should not be barred from participating in any future Commission auctions and from holding any Commission licenses. Additionally, we are authorizing the presiding administrative law judge to impose forfeitures if it is concluded that Commercial Realty and/or its principals misrepresented facts to the Commission during the IVDS application process.

II. BACKGROUND

2. In its Second Report and Order, 9 FCC Rcd 2348 (1994), the Commission established eligibility and other general rules that would govern the award of bidding credits and other benefits in Commission auctions to certain designated entities, including businesses

¹ IVDS is a point-to-multipoint, multipoint-to-point, short distance, communications service in which licensees may provide information, products, or services to individual subscribers located at fixed locations in the service area, and subscribers may provide responses.

² See Order, FCC 94-222, GN Docket 94-96 (released Aug. 30, 1994).

owned by women. The Commission stated that in order to qualify as a woman-owned business, women must have at least a 50.1 percent equity ownership and a 50.1 percent controlling interest in the entity. It stated further that "applicants must ensure and be prepared to demonstrate that de facto control truly resides with . . . female principals.³ In its Fourth Report and Order, 9 FCC Rcd 2330 (1994), the Commission stated that the aforementioned eligibility requirements would apply to entities seeking bidding credits for IVDS licenses.⁴ In addition, to ensure that winning bidders would be able to pay the full amount of their bids, the Commission required applicants claiming status as small businesses to tender a down payment equal to 10 percent of each winning bid (or adjusted bid, if a bidding credit was claimed) within five business days after the close of bidding. See 47 C.F.R. § 95.816(c)(4).

3. Additionally, the Second Report and Order adopted specific rules aimed at prohibiting collusive conduct in the context of competitive bidding. See 47 C.F.R. § 1.2105(c). These rules were designed to protect the integrity of the auctions and prohibit conduct that could "undermine the competitiveness of the auction process and prevent the formulation of a competitive post-auction market structure."⁵ The Commission, in its Fourth Report and Order, supra, made the anti-collusion rules applicable to bidders in the IVDS auctions.⁶ In addition to requiring disclosure of certain agreements, the rules prohibit all bidders from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders until the winning bidder has made its required down payment.⁷

4. Commercial Realty is a for-profit company incorporated in Florida. From the time of its incorporation until 1989, James C. Hartley served as Commercial Realty's sole director, President, and Registered Agent. Ralph E. Howe is identified on company documents filed with the Florida Department of State as the current director, President, and Registered Agent. On February 17, 1994, Mr. Hartley's wife, Teresa Hartley, entered into an agreement for Sale and Purchase of Corporate Stock, pursuant to which she purchased all of the outstanding shares of stock in Commercial Realty for \$500.

5. On June 13, 1994, Mrs. Hartley executed a Written Action of the Board of Directors of Commercial Realty which authorized Mr. Hartley to enter into and execute the IVDS applications, contracts, and any other documents for the purchase of IVDS licenses. The

³ See Second Report and Order, 9 FCC Rcd at 2396-97.

⁴ A twenty-five percent bidding credit for one of the two IVDS licenses in each market was available to a winning bidder that qualified as a female and/or minority-owned business.

⁵ Second Report and Order, 9 FCC Rcd at 2387.

⁶ See Fourth Report and Order, 9 FCC Rcd at 2335.

⁷ Second Report and Order, 9 FCC Rcd at 2387-88.

Written Action also authorized Mr. Hartley to acquire a 40 percent voting interest in, and become the sole director of, the company.

6. On June 23, 1994, Commercial Realty filed with the Commission an FCC Form 175 (Application to Participate in an FCC Auction), wherein Commercial Realty certified that it was a woman-owned small business, and that it was legally, technically, and financially qualified as an applicant. The certification was signed by Mr. Howe, who identified himself as a director of Commercial Realty. On its FCC Form 175, Commercial Realty specified its intention to bid for licenses in up to 277 markets.

7. On July 28 and 29, 1994, the Commission held an auction for IVDS licenses. Commercial Realty was a successful bidder in 20 IVDS markets.⁸ Commercial Realty submitted bids in these 20 markets totalling \$41,250,000. Because it claimed bidding credits in all but three of the markets, Commercial Realty's adjusted bids totalled \$32,762,500. Based on its total adjusted bids, Commercial Realty was required to make a down payment to submit additional funds necessary to bring its total deposits with the Commission up to at least \$3,266,750. The down payment was due on August 8, 1994. Commercial Realty failed to tender any down payment on August 8, 1994, and therefore was in default.⁹

8. Prior to Commercial Realty's default, the Commission became aware of actions taken by Mr. Hartley in attempting to have other winning bidders join him in petitioning the Commission to delay the down payment deadline. On August 3, 1994, Mr. Hartley transmitted by facsimile a letter to at least 15 of the other winning IVDS bidders urging them to join his petition. Mr. Hartley also sent an accompanying form letter the recipients could use to contact Commercial Realty's communications counsel and members of Congress to join him in his pursuit of delaying the down payment deadline. In response to this letter and the interest and confusion it created among other winning bidders, the Commission issued a Public Notice entitled "IVDS Bidder Alert," which stated unequivocally that the deadline would not be altered and warned that bidders who failed to submit their down payments by the deadline would be in default.¹⁰ This Public Notice was sent by overnight delivery to each IVDS winning bidder, including Commercial Realty.

⁸ Commercial Realty submitted high bids in the following markets: Detroit-Ann Arbor, MI, St. Louis, MO, Miami, FL, Pittsburgh, PA, Baltimore, MD, Minneapolis-St. Paul, MN, Atlanta, GA, San Diego, CA, Denver-Boulder, CO, Seattle-Everett, WA, Milwaukee, WI, Tampa-St. Petersburg, FL, Kansas City, MO, Phoenix, AZ, Indianapolis, IN, Portland, OR, Sacramento, CA, Greensboro, NC, Charlotte, NC, Raleigh-Durham, NC.

⁹ On August 16, 1994, Commercial Realty, and other winning bidders, filed with the Commission requests for waivers or special relief which would allow them to delay making the required down payment. Those requests were denied by the Commission. See Order, 9 FCC Rcd 6384 (Com. Car. Bur. 1994), applications for review and petitions for reconsideration pending.

¹⁰ See Public Notice, "IVDS Bidder Alert," released August 5, 1994.

9. In a declaration, dated August 15, 1994, submitted with a "Petition for Extraordinary Relief" dated the same day, Mr. Hartley declared, "under penalty of the laws of perjury" that prior to attending the auction, he had made arrangements to obtain immediate financing for up to \$4 million from a private investor. Mr. Hartley declared that this investor (also referred to as his "lender") "gave me an absolute commitment that an amount up to \$4 million dollars [sic] would be immediately available to cover my purchases." In another petition seeking to expand the scope of the Commission's investigation of IVDS auction misconduct, Commercial Realty submitted a Declaration prepared under penalty of perjury which purportedly documented that Commercial Realty had accepted a loan of \$4 million from Dean H. Tyler in order to purchase IVDS licenses. According to the Declaration, which bore the date June 13, 1994, Mr. Tyler swore:

I hereby affirm and declare that I had the sum of \$4,000,000 available to me through funds in banks and other investors, at the time I made the commitment and I earmarked that sum for the interactive video data services auction which, I understood, would take place in late July, 1994.

10. Mr. and Mrs. Hartley initially refused to participate in the Commission investigation into the practices of IVDS applicants and defied subpoenas directing them to provide information and to testify. On December 20, 1994, a United States District Court judge granted the government's petition to enforce the subpoenas and denied a motion to stay.¹¹ Mr. and Mrs. Hartley did testify on January 18 and 19, 1995.

III. DISCUSSION

11. The Commission previously determined that "if [an auction] default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may also declare the applicant and its principals ineligible to bid in future auctions, and may take other action that it may deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant."¹² As discussed below, we find that Commercial Realty and its principals engaged in gross misconduct. Based upon the Commission's investigation of this misconduct, we believe that further action should be taken to disqualify Commercial Realty from future auctions and from holding any Commission license. In a separate action, we are also imposing a forfeiture of \$390,000 against Commercial Realty for violations established by the investigation. Further action will be taken to dismiss Commercial Realty's applications for failure to tender any down payment and, upon reauction, to impose the default penalties required by Sections 1.2104(g) and

¹¹ See United States of America v. Commercial Realty St. Pete, Inc., et al., No. 94-345 (D.D.C. Dec 21, 1994), appealed sub nom. Commercial Realty St. Pete, Inc. v. U.S., No. 94-5391 (D.C. Cir docketed Dec. 30, 1994).

¹² Second Report and Order, supra, at ¶ 198; Fourth Report and Order, supra, at ¶ 28.

95.816(c)(6)(i) of the Commission's Rules.

A. False Financial Declarations

12. In our investigation, we learned that the Declarations provided by Mr. Hartley and Dean H. Tyler were false. Mr. Tyler testified as a part of our investigation under a grant of immunity that despite the claims made in his Declaration filed with Commercial Realty's pleading, he never made a commitment to loan \$4,000,000 to Commercial Realty. In fact, Mr. Tyler did not personally have that much money, he had never earmarked any amount for IVDS, and in any event, he would have insisted on an equity interest in the venture, not merely some rate of return on investment, as a precondition to making a loan. Mr. Tyler additionally testified that prior to the auctions he and Mr. Hartley never discussed a particular dollar amount that Mr. Hartley would need from Mr. Tyler. According to Mr. Tyler, Mr. Hartley drafted Tyler's Declaration and included the \$4,000,000 amount Mr. Hartley knew he needed for a down payment.

13. Mr. Tyler in his testimony stated that he knew the information in his Declaration was false when he signed it. He further testified that he only signed it because Mr. Hartley assured him that the technology for IVDS would not work and, therefore, Commercial Realty would not need the \$4,000,000 referenced in the Declaration. Mr. Hartley told Mr. Tyler, according to Mr. Tyler's testimony, that he needed the Declaration because of the Commission investigation.

14. Mr. Hartley, on the other hand, testified that he did not prepare the Tyler Declaration. He stated that his counsel, Lauren Colby and Richard Avis, prepared that Declaration. Mr. Hartley stated that Tyler's Declaration was only to state what had already taken place and that he did not think the Declaration was necessary. Moreover, Mr. Hartley testified that Mr. Tyler had committed to loan Commercial Realty \$4,000,000. However, Mr. Hartley presented no written evidence to back up his testimony.

15. It appears that Commercial Realty misrepresented facts to the Commission in both Mr. Hartley's Declaration and Mr. Tyler's Declaration. It is apparent from both Mr. Tyler's and Mr. Hartley's testimony that although the Tyler Declaration is dated June 13, 1994, it was not signed until after the IVDS auctions. Therefore, we know that Commercial Realty submitted this document to the Commission, intending the Commission to rely on the information contained therein, which bore a falsified date and apparently false information. Because of the contradictory testimony of Mr. Tyler and Mr. Hartley about who prepared the Tyler Declaration and why it was to be submitted to the Commission, we cannot presently determine the veracity of the other material information in that Declaration or the one signed by Mr. Hartley. Accordingly, appropriate issues will be designated to determine whether Commercial Realty, or its principals, misrepresented facts, lacked candor, or attempted to mislead the Commission about Commercial Realty's ability to pay its down payment. If so, the presiding officer shall determine whether Commercial Realty should be subject to a forfeiture up to the statutory limit for one or both violations, and whether it and its principals

should be barred from future auctions and from being Commission licensees. Moreover, if it is determined that Mr. Hartley intentionally misrepresented facts in either of these Declarations or other papers or testimony submitted to the Commission, because of the seriousness of such misrepresentations, we will refer any violations to the Department of Justice for possible criminal prosecution.

B. False Designated Entity Certification

16. The Commission's investigation reveals that Mr. Hartley appears to have controlled virtually all significant matters affecting Commercial Realty. In this regard, we find that Mr. Hartley was solely responsible for: speaking with Mr. Tyler about financing; requesting Richard Kent (his sister-in-law's brother) to assist in the bidding process; retaining attorney William Franklin to be Commercial Realty's communications counsel, directing Mr. Franklin's activities on behalf of the company, and paying Mr. Franklin for his services; retaining Steven Schupak to be Commercial Realty's technical consultant, directing Mr. Schupak's activities on behalf of the company, and paying Mr. Schupak for his services; retaining Kellie Boyle to perform public relations services on behalf of the company, directing Ms. Boyle's activities, and paying Ms. Boyle for her work; meeting with Fernando Morales of Interactive Return Service, a company which manufactures IVDS equipment; visiting the facilities at EON Corporation, a communications company with the technology for transmitting digital messages at the frequencies allocated by the Commission for IVDS, for a tour and product demonstration; encouraging other bidders to join with Commercial Realty in petitioning the Commission to delay the down payment deadline; incorporating American Interactive Consultants for the purpose of marketing interests in Commercial Realty's license; developing a Business Plan Summary for American Interactive Consultants; extending an offer to sell a minority stake in Commercial Realty for \$40,000,000 to Thomas Milmo, Chairman of the Board of Eon; and deciding that Commercial Realty would not make its down payment to the Commission. But for the fact that she signed some checks, the Commission investigation found no evidence that Mrs. Hartley ever took any actions on behalf of Commercial Realty. Mrs. Hartley, by her own testimony, made no decisions on behalf of Commercial Realty, but instead, left it to her husband to make all corporate decisions.

17. These above actions were taken by Mr. Hartley despite the fact that Commercial Realty claimed a bidding credit for being a woman-owned company. As stated previously, the Second Report and Order required that, in order to be eligible for the credit, both at least 50.1 percent of the equity and de facto control must reside with women or minorities.¹³ It is quite clear from all the facts, as shown above, Commercial Realty inappropriately claimed a bidding credit for being a woman-owned company because de facto control of the company was not in the hands of Mrs. Hartley. It also appears that the Hartleys intended to falsely represent Commercial Realty to be a woman-owned company in order to obtain bidding credits. Based on the fact that Mrs. Hartley did not exercise de facto control of the applicant, an appropriate

¹³ Second Report and Order, 9 FCC Rcd at 2396-97.

issue will be designated for hearing. The issue to be determined is whether Commercial Realty intentionally misrepresented facts, lacked candor, or attempted to mislead the Commission about its eligibility for a bidding credit. See 47 C.F.R. § 1.17. We will additionally authorize the presiding administrative law judge to impose a forfeiture up to the statutory limit on Commercial Realty if it is determined that Commercial Realty violated the Commission's rules. Moreover, if it is determined that the Commercial Realty intentionally falsely certified on its application that it was woman-owned and controlled, because of the seriousness of such misrepresentation, we will refer the matter to the Department of Justice for possible criminal prosecution of Commercial Realty's principals.

C. Improper Communications

18. The Commission's investigation found that shortly after the close of the IVDS auctions, Mr. Hartley began soliciting other winning bidders to seek postponement of the down payment deadline. The investigation found that Mr. Hartley had at least two conversations with Christopher Pedersen, a principal of Interactive America Corporation, another successful bidder in IVDS auctions, prior to the down payment deadline. Messrs. Hartley and Pedersen discussed perceived deficiencies in the current technology and the perceived inability of winning bidders to timely construct IVDS systems.¹⁴ Because we consider these conversations to have been made to convince other bidders that they would be at risk of substantial financial loss if they continued to pursue IVDS licenses by timely tendering down payments, we have found Commercial Realty apparently liable for a \$10,000 forfeiture for each violation of our anti-collusion rules.¹⁵

19. It appears that Commercial Realty and Mr. Hartley violated the anti-collusion rules and substantially abused our processes in the course of making communications to other bidders before the down-payment date. On August 3, 1994, Mr. Hartley sent a facsimile letter to at least 15 of the winning IVDS bidders asking them to join him in a petition to delay the down payments. Then, on August 5, 1994, Mr. Hartley, caused a press release to be delivered to major news agencies throughout the country, calling into question the Commission's IVDS payment and build-out requirements. The press release also stated that Commercial Realty intended to default on its down payment, calling into question the substance of its own bids.

20. It appears that Mr. Hartley's sending of these letters and causing the issuance of the press releases was intended to disrupt our auction procedures, especially since it appears that Mr. Hartley knew that Commercial Realty could not make the required down payment.

¹⁴ Mr. Hartley testified that he wanted EON's support in joining in a request to delay the down payment deadline because he believed that EON had a lot of clout with the Commission, but was unable to broach the issue with the company's officials. Mr. Hartley also testified that he believed that there were other undisclosed bidders who did not have the money to make their down payments.

¹⁵ Commercial Realty St. Pete, Inc., FCC 95-58 (released February 15, 1995).

The record establishes that Mr. Hartley had already decided by August 3, 1994, to have Commercial Realty default on its down payment.¹⁶ Therefore, facing the substantial penalties associated with defaulting, it appears that Mr. Hartley engaged in potentially collusive conduct to disrupt the auction process solely for Commercial Realty's benefit. Accordingly, appropriate issues will be designated to determine whether Commercial Realty and/or its principals knowingly violated the Commission's anti-collusion rules and abused the Commission's processes by their actions in attempting to solicit other winning bidders in joining a petition to defer the down payment date. In light of the evidenced adduced under this issue, the presiding officer shall determine whether Commercial Realty and its principals should be barred from future auctions and from holding any Commission license and/or subject to a forfeiture up to the statutory limit.

IV. CONCLUSIONS AND ORDERING CLAUSES

21. It appears that Commercial Realty and its principals have engaged in serious misconduct that call into question their basic qualifications to be a Commission applicant or licensee. If such misconduct is established, Commercial Realty and its principals should be prohibited from participating in future auctions and should be deemed to wholly lack the character qualifications for holding a Commission license. We believe that each of the abuses and violations, standing alone, if proven, is sufficient to prohibit Commercial Realty and its principals from participating in future auctions and from being Commission licensees.

22. Accordingly, IT IS ORDERED, pursuant to Section 312 of the Communications Act of 1934, as amended, 47 U.S.C. § 312, that Commercial Realty St. Pete, Inc., James C. Hartley, Teresa Hartley, and Ralph E. Howe ARE ORDERED TO SHOW CAUSE why they should not be barred from future auctions and prohibited from holding any Commission license. This inquiry will focus on the following issues:

- (1)(a) The facts and circumstances surrounding the aforementioned Declarations submitted to the Commission by Commercial Realty St. Pete, Inc.;
- (b) Whether Commercial Realty and/or its principals misrepresented facts, lacked candor, or attempted to mislead the Commission;
- (c) Whether, based on the evidence adduced pursuant to 1(a) and (b), above, Commercial Realty and/or its principals should be subject to a forfeiture up to the statutory limit pursuant to Section 503 of the Communications Act, as amended, 47 U.S.C. § 503.

¹⁶ In a memorandum dated August 3, 1994, to Mr. Hartley from William J. Franklin, Commercial Realty's communications counsel, Mr. Franklin noted that "you have decided not to file any deposits, and have instructed me to file a deferral petition."

(d) Whether, based on the evidence adduced pursuant to 1(a) and (b), above, Commercial Realty and/or its principals should be barred from future auctions and from holding Commission licenses.

(2)(a) The facts and circumstances surrounding Commercial Realty's claim of a bidding credit as a woman-owned small business at the IVDS auctions;

(b) Whether Commercial Realty and/or its principals misrepresented facts, lacked candor, or attempted to mislead the Commission in claiming a bidding credit as a woman-owned small business;

(c) Whether, based on the evidence adduced pursuant to 2(a) and (b), above, Commercial Realty and/or its principals should be subject to a forfeiture up to the statutory limit pursuant to Section 503 of the Communications Act, as amended, 47 U.S.C. § 503.

(d) Whether, based on the evidence adduced pursuant to 2(a) and (b), above, Commercial Realty's and/or its principals' conduct in requesting said bidding credit as a woman owned small business warrants barring Commercial Realty and/or its principals from future auctions and from holding Commission licenses;

(3) Whether Commercial Realty's and/or its principals' improper communication with Christopher Pedersen of Interactive America Corporation should bar Commercial Realty and/or its principals from future auctions and from holding Commission licenses;

(4)(a) The facts and circumstances surrounding the letter sent by facsimile to other successful IVDS auction bidders;

(b) The facts and circumstances surrounding the press release caused to be released by Commercial Realty on, or about, August 5, 1994;

(c) Whether based on the evidence adduced pursuant to 4(a), and (b), above, Commercial Realty and/or its principals abused the Commission processes and should be subject to a forfeiture up to the statutory limit pursuant to Section 503 of the Communications Act, as amended, 47 U.S.C. § 503;

(d) Whether based on the evidence adduced pursuant to 4(a), and (b), above, Commercial Realty and/or its principals abused the Commission processes and should be barred from future auctions and from holding Commission licenses;

(5) Whether, based on the totality of the evidence adduced pursuant to 1(a) and (b), 2(a) and (b), 3, and 4(a), and (b), above, and the violations of the

Commission's Rules established in the Notice of Apparent Liability for Forfeiture, File No. 519WT0002, Commercial Realty and/or its principals should be barred from future auctions and from holding Commission licenses.

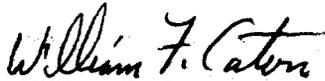
23. IT IS FURTHER ORDERED THAT the hearing shall be at a time and place and before an Administrative Law Judge to be specified in a subsequent Order.

24. IT IS FURTHER ORDERED THAT Commercial Realty St. Pete, Inc., James C. Hartley, Teresa Hartley, Ralph E. Howe, and the Wireless Telecommunications Bureau are made parties to this proceeding. The parties may avail themselves of an opportunity to be heard by filing written notices of appearance under Section 1.221 of the Commission's Rules, 47 C.F.R. § 1.221, within 20 days of the mailing of this Order by the Secretary. The notice and other expedited procedures of Section 1.822(b) shall not apply in this case.

25. IT IS FURTHER ORDERED, pursuant to Section 312(c) of the Communications Act, 47 U.S.C. § 312(c), that the burden of proceeding with the introduction of evidence shall be upon the Wireless Telecommunications Bureau.

26. IT IS FURTHER ORDERED, that the Secretary shall cause a summary of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Secretary