DOCKET FILE COPY ORIGINAL

ORIGINAL

VERNER · LIIPFERT
BERNHARD · McPHERSON AND HAND
CHARTERED

901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

WRITER'S DIRECT DIAL
(202) 371-6206

EX PARTE OR LATE FILED

RECEIVED
DEC 10 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 10, 1997

BY HAND

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Ex Parte Communications in WT Docket No. 97-82

Dear Ms. Salas:

On December 9, 1997, Lawrence Sidman of Verner, Liipfert, Bernhard, McPherson & Hand, representing ClearComm, L.P.; ClearComm's President, Javier Lomoso; its Chief Financial Officer, John Duffy and its Senior Vice President and General Counsel, Tyrone Brown, participated in a series of meetings at the Commission, all pertaining to the pending Petitions for Reconsideration of the Commission's *Second Report and Order* in its PCS C block restructuring proceeding. These ClearComm representatives met with Chairman William Kennard and his Legal Advisor, Ari Fitzgerald; Commissioner Harold Furtchgott-Roth and his Senior Legal Advisor, Paul Misener; Karen Gulick, Legal Advisor to Commissioner Gloria Tristani; and Rosalind Allen, Kathleen O'Brien-Ham and James Rubin, all of the Wireless Telecommunications Bureau.

The substance of these meetings reflected the arguments advanced by ClearComm in its Petition for Partial Reconsideration of the *Second Report and Order*. In addition, ClearComm discussed its pending Application for Review of the bid withdrawal penalty of nearly $3.3 million imposed upon ClearComm by the Bureau. The attached two-page synopsis of ClearComm's Petition for Partial Reconsideration and the attached November 25, 1997 letter to the Commissioners were distributed at these meetings.

In accordance with Section 1.1206 of the Commission's Rules, an original and one copy of this letter and two written ex parte presentations submitted on behalf of ClearComm are being filed with your office.

0+1

Any questions concerning this matter should be directed to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures

cc w/o encl: Chairman William Kennard
Commissioner Harold Furtchgott-Roth
Ari Fitzgerald
Paul Misener
Karen Gulick
Rosalind Allen
Kathleen O'Brien-Ham
James Rubin

THE COMMISSION SHOULD ELIMINATE THE DOWN PAYMENT FORFEITURE FOR SMALL BUSINESS LICENSEES WHICH ELECT THE DISAGGREGATION OPTION

Although the Commission's *Second Report and Order* restructuring the debt obligations of C block licensees represents a reasonable compromise in many respects, the FCC should eliminate the *Order's* requirement that a small business licensee availing itself of the disaggregation option forfeit 50 percent of its down payment presently on deposit with the Commission. The Commission should instead permit disaggregating licensees to apply those funds toward their outstanding interest obligations to the Commission following disaggregation.

- ***The* Order *Provides No Analytical Support For The Forfeiture***

First, unlike the penalties imposed on the amnesty and prepayment options, the Commission has provided no rationale to support the imposition of a forfeiture of 50 percent of a disaggregating small business' down payment. Unlike the other options, disaggregation does not implicate a default in any way: The *Order* acknowledges that the FCC will continue to receive full payment at the net high bid price pro-rated for the portion of the spectrum retained by the licensee. In addition, a disaggregating licensee will continue its commitment to serve each and every market it won in the auction. By contrast, licensees electing amnesty or prepayment are abandoning entire markets. Also, disaggregation presents none of the risks of unfairness or of "gaming" of future auctions that amnesty or prepayment do. The disaggregation option is merely a rational extension of a practice already permitted by the Commission's rules to which no penalty normally attaches.

- ***The Down Payment Forfeiture Undermines The Pro-Competitive Goals Of Section 309(j) And The Objectives of the* Order**

Depriving disaggregating small businesses of the use of critical capital they have already raised where they are endeavoring to provide PCS service in every market they won at auction is destructive of the very objectives which are the cornerstones of the C block: ensuring that small and minority-owned businesses receive a meaningful opportunity to participate in the telecommunications sector; encouraging rapid deployment of wireless service; and facilitating the emergence of genuine competition in the marketplace. In ClearComm's case, were the forfeiture allowed to stand, it would wrest from ClearComm $17 million in essential funds required to finance the buildout of its PCS systems. This loss would compel ClearComm to raise that $17 million in cash a second time in today's financial markets which are far less receptive to wireless investment than they were at the time of the C block auction.

Moreover, the 50 percent down payment forfeiture would yield no countervailing public policy benefits to offset the foregoing sacrifices. The very nature of the disaggregation option, and the safeguards the Commission has crafted to govern its

usage, make the forfeiture unnecessary to preserve in any way the integrity of the auction process or fairness to other bidders. Its effect is only to yield a windfall to the Treasury without enhancing the development of competitive new PCS services.

- ***Disaggregating Licensees Should Be Permitted To Apply Their Remaining Down Payment Funds Toward Their Outstanding Interest Obligations To The FCC***

The public interest would be far better served by permitting a small business, following disaggregation, to apply its Residual Down Payment Funds toward the outstanding interest obligation the licensee owes the Commission. Affording these small start-up companies full credit for their down payments already in the Commission's possession will enable them to direct their fundraising efforts toward build-out of the licensees' markets, a use at once most attractive to investors and most beneficial to consumers.

- ***In No Event Should Disaggregating Licensees Be Penalized More Harshly Than Those Electing To Prepay***

If, contrary to ClearComm's urging, the Commission still decides to preserve some down payment forfeiture for small businesses electing disaggregation, it should reduce it. The penalty of fifty percent of the total down payment is far harsher than the thirty percent down payment forfeiture which the Commission applied to the prepayment option. At a minimum, the FCC should make the penalty functionally equivalent to that in the prepayment context, no more than <u>thirty percent</u> of the Residual Down Payment Funds (*i.e.*, fifteen percent of the total down payment).

Clear Comm

DUPLICATE

November 25, 1997

NOV 25 1997

The Honorable William E. Kennard
The Honorable Susan Ness
The Honorable Gloria Tristani
The Honorable Michael Powell
The Honorable Harold Furchgott-Roth
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: Application for Review of ClearComm, L.P., filed January 21, 1997

Dear Mr. Chairman and Commissioners:

This letter is to ask for your immediate consideration and grant of the above-captioned Application for Review filed January 21, 1997, by ClearComm, L.P., formerly PCS 2000, L.P. ("ClearComm). The Application seeks review of the action of the Wireless Telecommunications Bureau imposing a bid withdrawal payment of nearly $3.3 million on ClearComm for a bidding error in the eleventh round of the Norfolk, Virginia C-Block PCS auction.[1]

I have enclosed a copy of our Application for Review which goes into the complete background of the case. Suffice it to say that in the eleventh round of the Norfolk, Virginia C-Block PCS auction, ClearComm intended to bid 18,006,000 but instead submitted a bid

---

[1] *In the Matter of PCS 2000, L.P., Request for Waiver of Section 24.704(a)(1) of the Commission's Rules*, __ FCC Rcd ___, DA 96-2156 (rel. December 20, 1996). That order also assessed a bid withdrawal payment of more than $1.2 million for a withdrawn bid in the C-Block PCS auction for Omaha, Nebraska, but ClearComm does not contest that penalty. In addition, the Commission imposed a $1 million forfeiture against ClearComm for the misrepresentation of its bidding agent and former principal, Terry Easton, involving the Norfolk, Virginia bidding error. *Notice of Apparent Liability for Forfeiture*, 12 FCC Rcd 1703 (1997). The facts surrounding the aftermath of the erroneous bid are also the subject of a hearing designation order recently issued by the Commission. *Westel Samoa, Inc.*, __ FCC Rcd ___, WT Docket No. 97-199 (rel. September 9, 1997).

of $180,060,000 – exactly 10 times the intended bid amount. The bid was the result of human error – pure and simple. In fact, the Bureau's Order specifically concluded that the bid was simply erroneous.[2]

As is more fully explained in our Application for Review, we believe that the imposition of a $3.3 million fine on the facts of this case is wrong as a matter of law and policy:

- While we appreciate and support the Commission's efforts to insure the integrity of its auction process, the severe punishment of a truly erroneous bid (as the Bureau has specifically found the Norfolk bid to be) will do nothing to discourage bids that are "mistaken on purpose". There is simply no way that the punishment of true mistakes is going to further the Commission's goal of discouraging "insincere bidding".

- ClearComm is aware of no other government auction process that punishes bidders for erroneous bids. To the contrary, in other government auctions, bid withdrawal or rescission is routinely allowed without penalty where the bid is clearly mistaken as the result of an arithmetical or clerical error and where the bidder gives prompt notification of the error. In fact, there is a good deal of judicial precedent that says that equitable considerations require the government not to take advantage of clearly mistaken bids.[3] While the Bureau has argued that the use of simultaneous multiple round bidding insulates the FCC from these equitable principles, it is difficult to imagine what the kind of auction has to with basic equity.

- Finally, the policy works a substantial hardship on start-up, entrepreneurial companies like ClearComm. ClearComm has been a C-Block success story. It is a small business controlled by women and minorities. But it has not experienced the sort of problems that other C-Block companies have faced. It is currently implementing its business plan to bring competitive wireless

---

2 *Order* at ¶ 9.

3 *E.g., Ruggiero v. United States*, 420 F.2d 709 (Cl. Ct. 1970).

communications to its markets and, in fact, looking for ways to grow and serve the burgeoning wireless market. However, given the start-up nature of the company, given the costs associated with building out an extensive wireless network, and, indeed, given the cost of the spectrum which the company obtained in the auctions, nearly every dollar expended becomes critical. A forfeiture of $3.3 million can only harm the implementation of ClearComm's attempts to bring competitive wireless service to the markets it will serve.

Thank you for your attention to this matter. If you have any questions at all or if you would like any further information, please let me know.

Sincerely,

Tyrone Brown
Senior Vice President

cc: Magalie Roman Salas, Secretary
Dan Phythyon
Rosalind Allen
Kathleen O'Brian Ham

DUPLICATE

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

In the Matter of	)	
	)	
PCS 2000, L.P.,	)	
Request for Waiver of	)	
Section 24.704(a)(1)	)	
of the Commission's Rules	)	
	)	
PCS 2000, L.P.,	)	
Bid Withdrawal Payment	)	
for License B332	)	
(Omaha, Nebraska)	)	

RECEIVED
JAN 21 1997
Federal Communications Commission
Office of Secretary

APPLICATION FOR REVIEW

PCS 2000, L.P. ("PCS 2000"), by its attorneys and for the reasons stated herein, respectfully requests review of the above-captioned Order of the Wireless Telecommunications Bureau, setting PCS 2000's bid withdrawal payment for License B324 (the Norfolk, Virginia Basic Trading Area ("BTA")) at $3,273,374.00.[1]

[1] In the Matter of PCS 2000, L.P., Request for Waiver of Section 24.704(a)(1) of the Commission's Rules, DA 96-2156 (rel. Dec. 20, 1996) ("*Order*"). The *Order* also assesses a bid withdrawal payment of $1,257,771.00 for License B332 (the Omaha, Nebraska BTA). PCS 2000 does not contest this payment. The *Order* states that issues relating to alleged misrepresentations by Mr. Anthony Easton will be treated in a separate proceeding. This Application for Review is not intended to address such issues or affect other Commission action with regard to those issues in any way, but is filed simply to assure that PCS 2000 receives the same treatment as similarly situated parties with respect to the bidding error itself.

I. INTRODUCTION AND SUMMARY

PCS 2000, a small business controlled by women and minorities, was an active participant in the Block C auction for personal communications services ("PCS") licenses, winning fifteen BTAs around the country. On January 23, 1996, in Round 11 of the Block C auction, PCS 2000 entered new bids for 38 markets, including License B324. For each of these selected markets, PCS 2000 intended to enter the minimum bid increment. Such an increment would have resulted in a bid of $18,006,000.00 for License B324. However, PCS 2000 inadvertently submitted an erroneous bid of $180,060,000.00 for that market, exactly ten times as large as the intended bid. PCS 2000 discovered the error approximately two hours after the close of bidding for Round 11, when it downloaded the round results from the FCC's internet FTP server, and its agent immediately telephoned the FCC's auction contractor to indicate that the $180,060,000.00 bid was in error. On January 24, 1996, in Round 12 of the auction, PCS 2000 withdrew its erroneous bid for License B324.

Three days after submitting the erroneous bid, PCS 2000 filed with the Commission a Request for Expedited Waiver or Reduction of the Withdrawal Penalty.[2] PCS 2000 subsequently amended its Request for Waiver on February 21, 1996, after discovering new information relating to the submission of its Round 11 bid.[3]

---

[2] PCS 2000, L.P., Request for Expedited Waiver or Reduction of Withdrawal Penalty (filed Jan. 25, 1996) ("*Request for Waiver*").

[3] PCS 2000, L.P., Amended Request for Expedited Waiver or Reduction of Withdrawal Penalty (filed Feb. 21, 1996) ("*Amended Request for Waiver*").

On December 20, 1996, the Bureau ruled on PCS 2000's *Amended Request for Waiver*, concluding that "an erroneous bid had been made by PCS 2000, the Commission was properly notified, and the bid was withdrawn in the next round."[4] Thus, the Bureau found "that full enforcement of the bid withdrawal payment provisions in this instance would not serve the purpose of the bid withdrawal rule, and would be contrary to the public interest."[5]

Despite acknowledging that PCS 2000's bid for License B324 was an obvious mistake that PCS 2000 promptly attempted to correct, the Bureau nevertheless imposed a penalty of $3,273,374.00 on PCS 2000, based on a formula adopted in the Commission's *May 3 Order* dealing with two other such waiver requests.[6] In the *May 3 Order*, the Commission noted

> that the bid withdrawal payment provisions are silent on how to address erroneous bids which result from typographical or clerical errors. In cases in which the erroneous bid exceeds the intended bid by factors of 10 or more, full application of the bid withdrawal payment provisions could impose an extreme and unnecessary hardship on most bidders.[7]

The Commission was "concerned, however, that a complete waiver of these provisions could threaten the economic efficiency of the auction process. Such a precedent would encourage future bidders who are uncertain about how much more to bid on a particular

---

4 *Order* at ¶ 9.

5 *Id.*

6 In the Matter of Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C., Requests to Waive Bid Withdrawal Payment Provisions, FCC 96-203 at ¶ 8 (rel. May 3, 1996) ("*May 3 Order*").

7 *Id.* at ¶ 14.

license to submit 'mistaken' bids intentionally so as to gain insight into competitors' valuation of licenses."[8] Thus, the Commission devised the following formula to calculate bid withdrawal payments for mistaken bids: If a mistaken bid is withdrawn in the same round in which it was submitted, the bid withdrawal payment will be the greater of a) the minimum bid increment for that license and round; or b) the standard bid withdrawal payment calculated as if the bidder had made a bid at the minimum accepted bid. If a mistaken bid is withdrawn in the round immediately following the round in which it was submitted -- as is the case here -- and the auction is in Stage I or Stage II, the withdrawal payment will be the greater of a) two times the minimum bid increment during the round in which the mistaken bid was submitted or b) the standard withdrawal payment calculated as if the bidder had made a bid at one bid increment above the minimum accepted bid.[9] Applying this newly devised formula to PCS 2000 yields a penalty of $3,273,374.00.

II. A $3,273,374.00 BID WITHDRAWAL PAYMENT FOR AN INADVERTENT BIDDING ERROR IS NOT REASONABLY RELATED TO THE COMMISSION'S PUBLIC INTEREST OBJECTIVES NOR IS IT SUPPORTED BY CASE PRECEDENT

The *Second Report and Order* in the Commission's competitive bidding rulemaking proceeding establishes a bid withdrawal payment requirement in order to discourage insincere bidding. As the Commission stated, "[i]nsincere bidding, whether purely frivolous or strategic, distorts the price information generated by the auction process and reduces its

---

8 *Id.* at ¶ 16.

9 *May 3 Order* at ¶ 18.

efficiency."[10] However, as recognized by the Bureau, PCS 2000's bidding error was neither frivolous nor strategic but rather, an obvious, unintended mistake. Because the agency's competitive bidding rules, at the time of the Block C auction, did not contemplate penalizing parties who made inadvertent erroneous bids, the Commission should grant PCS 2000 unequivocal relief from any bid withdrawal payment relating to License B324.

Full relief from this bid withdrawal penalty should be granted as a matter of both law and equity. Indeed, the FCC's refusal to permit withdrawal of a mistaken bid without penalty is inconsistent with auction industry practice. As MAP Wireless, L.L.C. ("MAP") notes,

> [a]lthough auctions are quite new to the Commission, competitive bidding principles and procedures are not new to government, and have been used extensively for years by other agencies. There is an established body of precedent relating to clerical or arithmetical errors that is and should apply to the instant facts.[11]

Specifically, in cases involving competitive bidding with government agencies, bid withdrawal or rescission has been allowed without penalty where a bid is clearly mistaken as a result of an arithmetical or clerical error, and the bidder promptly notifies the government agency upon discovery. In particular, bid withdrawal or rescission without penalty is required where the error is clear and the circumstances surrounding the bid itself are so extraordinary as to raise a question on its face as to whether a clerical or arithmetical error has occurred.[12] In

---

[10] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 2348, 2373 (1994) ("*Second Report and Order*").

[11] MAP Wireless, L.L.C. Petition for Reconsideration of Bid Withdrawal Payment at 8 (filed June 3, 1996) ("*MAP Petition for Reconsideration*").

[12] *See, e.g., Ruggiero v. United States*, 420 F.2d 709 (Cl. Ct. 1970); *Chernick v. United*

(Continued...)

these circumstances, the government agency has an equitable obligation not to take advantage of a "bid [that] is based on or embodies a disastrous mistake."[13] The cases further recognize that "the most ordinary kind of arithmetical or clerical mistake involves the misplacing of a decimal. Any instance of a monetary figure one-tenth or ten times what it might naturally be expected to be, is a warning flag."[14]

Surprisingly, the Commission summarily rejected the applicability of this equitable doctrine "which the federal courts impose upon all other federal and state agencies that utilize auctions or other bid submission processes,"[15] finding it "inapposite because of the unique auction methodology employed here (*e.g.*, simultaneous multiple round bidding.)"[16] However, "it is difficult to imagine precedent that is more on point or more compelling in dictating relief on the present facts."[17] Indeed, professionals within the auction industry have commented that such equitable principles should apply here.[18]

(...Continued)
States, 372 F.2d 492 (1967).

[13] *Ruggiero*, 420 F.2d at 713.

[14] *Chernick*, 372 F.2d at 495.

[15] *See* Reply Comments of Antigone Communications Limited Partnership, DA 96-154 at 4 (filed March 1, 1996).

[16] *May 3 Order* at ¶ 16.

[17] MAP Petition for Reconsideration at 9.

[18] *See* Comments of Kennedy-Wilson International, DA 96-154 at 2 (Feb. 16, 1996) ("In the specific cases before the Commission, each of the bidding errors was clearly an error. Each bidder, when it became aware of [its] mistake, withdrew [its] bid immediately . . . In each case, it is also clear that no attempt at "gaming" was being made by the bidders. Accordingly, our recommendation in each of these three cases is that the withdrawal payment
(Continued...)

Instead, the FCC adopted new rules in its *May 3 Order* designed "to eliminate the strategic benefit of purposely submitting mistaken bids."[19] Thus, while recognizing that full enforcement of the bid withdrawal payment provisions would not serve the public interest in the case of PCS 2000's clearly mistaken bid, the Bureau nevertheless applies the new formula and imposes a $3,273,374.00 penalty on PCS 2000 so as to deter strategic behavior that "could threaten the economic efficiency of the auction process."[20] Both the Bureau and the Commission fail to explain, however, how complete relief from the bid withdrawal penalty would encourage strategic erroneous bids. Parties commenting on the bid withdrawal waiver requests agree with PCS 2000's conclusion that "[p]enalties are *not* needed or effective in 'deterring' bidders from committing errors. Given the cost and anxiety associated with any waiver request, every applicant has a powerful incentive to avoid mistakes."[21] The agency's

---

(...Continued)
requirement be waived entirely. Inadvertent entry errors by bidders, immediately corrected and reported, should not be subject to penalty - especially the onerous and excessive penalties which now result"); Comments of National Auctioneers Ass'n, DA 96-145 at 2 (Feb. 22, 1996) ("bidders who submitted flawed bids where there is no evidence of improper attempts to control the bids should be excused from bid withdrawal penalties").

[19] *May 3 Order* at ¶ 17.

[20] *Order* at ¶ 8.

[21] Reply Comments of PCS 2000, DA 96-145 at 3 (filed March 4, 1996) ("*PCS 2000 Reply Comments*"). *See also* Atlanta Trunking Associates, Inc. Petition for Reconsideration at 8 (filed June 3, 1996) ("*ATA Petition for Reconsideration*") ("[a]s a practical matter, any bid ten times the minimum bid increment must be *presumed* to be cast in error. No rational bidder would risk a huge bid withdrawal penalty just to gain insight into a competitor's strategy"); MAP Petition for Reconsideration at 11 ("[t]he Commission's reasoning assumes that, if a complete waiver is granted, future bidders will cavalierly expose themselves to [ ] a multimillion dollar risk in order to gain a marginal strategic advantage in the auction, and trust their ability to convince the FCC to waive its bid withdrawal penalty. This proposition strains credulity").

practice of evaluating waiver requests on a case-by-case basis, requiring sworn declarations as to the veracity of factual circumstances, and denying relief where there is evidence that a bidder has engaged in insincere or frivolous bidding, renders the Commission's concerns regarding strategic erroneous bids unrealistic. Accordingly, the bid withdrawal penalty as adopted in the *May 3 Order* and imposed on PCS 2000 in the Bureau's recent *Order*, bears no reasonable relationship to the FCC's stated objectives or factual circumstances regarding the need to deter strategic auction behavior. As such, it must be rescinded and no penalty imposed where, as here, an inadvertent bidding error has occurred.

Moreover, as MAP notes, the Commission need not penalize parties who submit erroneous bids in order to address concerns regarding strategic bidding mistakes. For example, the FCC auction software could be modified to issue a specific warning to bidders if their bids exceed more than ten increments.[22] Alternatively, in cases where someone requests a waiver of the full bid withdrawal penalty on grounds of mistake, the Commission could base the penalty on the next highest bid, *i.e.*, the highest "valid" bid in the round.[23] Such a penalty is likely to be proportionate to the impact of the bidding error on the auction.

In this manner, the FCC can more appropriately address its concerns about strategic or frivolous bidding without imposing excessive penalties on auction participants who make inadvertent errors. It has been noted that bidders seeking a waiver of the bid withdrawal payment do not get a free ride, as they face significant legal fees and constraints in capital

---

[22] *Id.* at 13, *citing* Comments of Auction Strategy Inc., DA 96-145 at 2 (filed Feb. 12, 1996); Statement of Professor Barry Nalebuff at ¶ 4 (March 31, 1996) (Attachment to MAP's Petition for Reconsideration).

[23] *See PCS 2000 Reply Comments* at 6, n.12.

markets as well as the serious risk that the penalty will not be waived.[24] For these reasons, a penalty of $3,273,374.00 as applied to PCS 2000 is unjust and unwarranted, and accordingly must be rescinded.

III. CONCLUSION

The penalty imposed by the *Order* violates an established body of case law and public policy concerning mistaken bids that result from clerical or arithmetic errors. Moreover, the penalty is not reasonably related to the Commission's goal of eliminating strategic bidding behavior. Accordingly, PCS 2000 urges the Commission to grant it a complete waiver of the bid withdrawal payment, and to rescind the $3,273,374.00 penalty imposed by the *Order*.

Respectfully submitted,

PCS 2000, L.P.

By: _____

Robert L. Pettit
Tyrone Brown
Lauren A. Carbaugh
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Its Attorneys

Dated: January 21, 1997

---

[24] *MAP Petition for Reconsideration* at 14, *citing* Statement of Professor Barry Nalebuff at ¶ 4.