

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

In the Matter of)	
)	
C & W SYSTEMS, LTD.)	FCC File No. 0000129660
)	
Request for Waiver of Commission's Rules in)	
Order to Provide 39 GHz Fixed Microwave)	
Service at Various Locations in the United States)	

ORDER

Adopted: February 1, 2001

Released: February 5, 2001

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On May 26, 2000, C & W Systems, Ltd. (C & W) requested waiver of the Commission's Rules regarding the filing of exhibits with FCC Form 601 (long-form application) for authorization to provide 38.6 to 40.0 GHz (39 GHz) fixed microwave service.¹ For the reasons discussed below, we grant a waiver of these rules and accept C & W's late submission of its exhibits.

II. BACKGROUND

2. On May 8, 2000, the Commission's 39 GHz band auction (Auction No. 30) concluded.² On May 10, 2000, the Wireless Telecommunications Bureau (Bureau) released a *Public Notice* that announced the winning bidders in Auction No. 30.³ All winning bidders were required to electronically file a complete long-form application no later than 6:00 p.m. Eastern Standard Time on May 24, 2000.⁴ In the *Public Notice*, the Bureau informed all winning bidders that incomplete or defective applications may be returned to the applicant.⁵

3. For a long-form application to be deemed complete, all winning bidders must attach an exhibit (Exhibit A) that provides full and complete disclosure of all relevant ownership information.⁶ Winning

¹ Letter from Dr. Narisa N. Y. Chu, President, C & W Systems, Ltd., to D'wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (filed May 26, 2000) (Waiver Request).

² 39 GHz Band Auction Closes, *Public Notice*, 15 FCC Rcd 13648, 13648 (WTB 2000) (*Auction Closing Public Notice*).

³ *See id.*

⁴ *Id.* at 13649.

⁵ *Id.* at 13764.

⁶ 47 C.F.R. §§ 1.2107(c), 1.2112; *see Auction Closing Public Notice*, 15 FCC Rcd at 13766-69.

bidders may provide some of the information required in Exhibit A by attaching a copy of their current FCC Form 602.⁷ A long-form application that does not include an Exhibit A is defective and subject to dismissal.⁸ The Commission's Rules require that winning bidders claiming small business status, and thus, eligibility for a bidding credit, attach an exhibit (Exhibit C) which demonstrates that average gross revenues for the preceding three years did not exceed the requisite eligibility thresholds,⁹ and another exhibit (Exhibit D) which lists and summarizes all agreements and other instruments pertaining to such status.¹⁰ A winning bidder who claims small business status and fails to include the requisite exhibits supporting the claim is deemed ineligible for the bidding credits and thus must pay the gross winning bid.¹¹

4. C & W, an applicant claiming status as a "very small business,"¹² was the winning bidder for authorizations to serve the following Basic Economic Areas (BEAs): BEA009 (channel block F), BEA011 (channel block B), BEA054 (channel block B), BEA068 (channel blocks A, B and D), BEA162 (channel block B), and BEA166 (channel block B).¹³ C & W did not attach any exhibits when it electronically filed its long-form application on May 13, 2000. C & W states that, on the day of the filing, the principals of C & W departed for Geneva, Switzerland for a May 15 to 19, 2000 International Telecommunication Union meeting, and remained in Europe until May 23, 2000.¹⁴

5. On May 26, 2000, C & W manually and electronically filed a FCC Form 602,¹⁵ and also requested a waiver of the Commission's Rules regarding the timely filing of a complete long-form

⁷ The FCC Form 602 is used by applicants and licensees in auctionable wireless services to submit ownership information in conjunction with license applications, renewals, license assignments, and transfers of control. See Wireless Telecommunications Bureau Answers Frequently Asked Questions Concerning Reporting of Ownership Information on FCC Form 602, *Public Notice*, 14 FCC Rcd 8261, 8261 (1999). The filing of the FCC Form 602 with the Commission is a separate requirement from the timely submission of an Exhibit A. See *Auction Closing Public Notice*, 15 FCC Rcd at 13653. A winning bidder of a license in an auctionable service must have on file a current FCC Form 602. 47 C.F.R. § 1.919. If the winning bidder does not have a FCC Form 602 on file at the time the auction closes, it must manually file the form with the Commission when the long-form application is filed. *Id.*; see *Auction Closing Public Notice*, 15 FCC Rcd at 13653.

⁸ 47 C.F.R. §§ 1.934(d), 1.2107(c), 1.2112.

⁹ 47 C.F.R. §§ 1.2110(i), 101.1209(b)(ii); see *Auction Closing Public Notice*, 15 FCC Rcd at 13769-71.

¹⁰ 47 C.F.R. § 1.2112(b)(2); see *Auction Closing Public Notice*, 15 FCC Rcd at 13771.

¹¹ 47 C.F.R. § 1.2110(i); see *Auction Closing Public Notice*, 15 FCC Rcd at 13769-71. The gross bid is the dollar amount bid, exclusive of any bidding credits. The net bid is the dollar amount bid that takes into account any bidding credit for which the high bidder is eligible under Commission Rules. See *Communications Pacific, Inc., Conditional Grantee for License EA 173C (Guam – Northern Mariana), Auction No. 16, Order*, 15 FCC Rcd 11774, 11775 n.7 (WTB CWD 2000).

¹² For the 39 GHz band auction, a very small business is an entity that, together with its affiliates and controlling interests, has average gross revenues that are not more than \$15 million for the preceding three years. 47 C.F.R. § 101.1209(b)(ii). A winning bidder in the 39 GHz band auction that qualifies as a very small business may use a bidding credit of 35 percent to lower the cost of its winning bid. 47 C.F.R. § 101.1208(a).

¹³ See *Auction Closing Public Notice*, 15 FCC Rcd at 13659, 13664, 13666, 13671, 13682, 13694.

¹⁴ Waiver Request at 1.

¹⁵ Waiver Request at 1.

application, as well as a waiver of the Commission's Rules regarding the timely filing of a FCC Form 602.¹⁶ In the waiver request, the president of C & W states that, until her return from Europe, she did not realize that C & W was required to attach exhibits to the long-form application.¹⁷ On June 23, 2000, C & W amended the long-form application by submitting an Exhibit A and C.¹⁸ The Exhibit C listed average taxable income for the preceding three years, rather than average gross revenues.¹⁹ On June 26, 2000, C & W amended its long-form application again when it attached another Exhibit C, which listed the average gross revenues for the preceding three years, and an Exhibit D.²⁰ The amended application C & W filed on June 23, 2000, was accepted for filing on June 28, 2000.²¹

III. DISCUSSION

6. The Commission may grant a waiver request if it is demonstrated that 1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest; or 2) the "unique or unusual circumstances of the instant case" make application of the rules "inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative."²² While we are not persuaded that C & W's arguments in its waiver request constitute sufficient grounds for the requested relief, we nonetheless will waive, on our own motion and for other reasons, the rules regarding the timely submission of the attached exhibits.

7. C & W makes no argument that application of the rules would be inconsistent with their underlying purpose. Indeed, it is clear in this particular case that applying the rule that all long-form applications must have an ownership disclosure exhibit upholds the rule's underlying purpose (*i.e.*, to allow the Commission to determine the real party in interest,²³ compliance with the rules prohibiting collusion²⁴ and restricting foreign ownership²⁵).²⁶ By the same token, we believe that the underlying purpose of the

¹⁶ *Id.* Although C & W failed to specify a specific rule in its request, we presume that it was referring to the long-form application filing requirements that are set forth in 47 C.F.R. §§ 1.2110(e)(1),(i), 1.2112, 101.1208(a). We will therefore treat C & W's request as a request to waive these particular rules.

¹⁷ Waiver Request at 1.

¹⁸ FCC Form 601, File No. 0000129660, filed June 23, 2000.

¹⁹ *Id.* at Exhibit C.

²⁰ FCC Form 601, File No. 0000129660, Exhibits C and D, filed June 26, 2000.

²¹ Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, *Public Notice*, Report No. 570 (rel. Jun. 28, 2000). We note that acceptance for filing does not preclude subsequent dismissal of an application that is found, upon further examination, to be defective. 47 C.F.R. § 1.933(b).

²² 47 C.F.R. § 1.925(b)(3)(ii).

²³ 47 C.F.R. § 1.2112(a).

²⁴ 47 C.F.R. §§ 1.2105(a)(2)(viii), (ix), 1.2107(d).

²⁵ 47 C.F.R. § 101.7.

rules regarding Exhibits C and D (*i.e.*, to allow the Commission to ensure that winning bidders claiming small business status qualify for such status²⁷) is upheld by application of those rules to this case.

8. As for the second waiver element, we do not believe that a scheduled trip to Europe constitutes an “unique or unusual circumstance.” Furthermore, there is no evidence that, absent the trip to Europe, C & W would have been more thorough in its review of the *Public Notice* and thus more observant of the Commission’s Rules that govern the filing of the long-form application and the attached exhibits. In this regard, C & W does not contend that the trip to Europe was the reason that it was unaware of the filing requirements. Specifically, the president of C & W states that she did not realize, until her return from Europe, that C & W’s long-form application required exhibits on ownership, average gross revenues for the preceding three years, and agreements and other instruments in support of its claimed very small business status. We conclude that ignorance of the Commission’s Rules is no excuse for noncompliance.²⁸ It is particularly inexcusable in this case because the May 10, 2000 *Public Notice*, which C & W received on May 12, 2000, presented winning bidders with a detailed explanation of the Commission’s Rules regarding the filing of the long-form application and the attached exhibits.²⁹ In addition, we are concerned that a grant of the requested waiver for the reasons given by C & W could encourage winning bidders in future Commission spectrum auctions to engage in similar conduct.³⁰

9. Although, as noted, we reject the arguments that C & W made in its waiver request, we will, nevertheless, waive the rules regarding the timely submission of a long-form application ownership disclosure exhibit, very small business eligibility exhibits, and FCC Form 602. Our decision to grant C & W’s waiver request is partly based on our recognition that C & W’s failure to timely submit the exhibits as well as a FCC Form 602 was a post-auction delinquency that did not disrupt the auction process nor undermine the Commission’s policy of facilitating rapid implementation of reliable communications service to the public. Under the circumstances presented, we believe that grant of a waiver here would further the public interest and expedite the licensing of and provision of service in the BEAs and 39 GHz band spectrum covered by the subject application. We nonetheless note that our decision to waive these rules in this instance should not suggest that such waivers will be routine. On the contrary, in the future, absent extraordinary circumstances, we will not allow winning bidders to submit untimely exhibits to long-form applications. Further, in instances where the untimely submitted exhibits disclose ownership information,

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²⁶ See generally Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2375 ¶ 161, 2387 ¶ 225 (1994) (*Competitive Bidding Second Report and Order*).

²⁷ 47 C.F.R. §§ 1.2110(i), 101.1209(b); cf. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391 ¶ 242.

²⁸ See, e.g., Application of Supercom, Inc., and Super Com Limited Partnership of Northern Michigan, and Application of Super Com Limited Partnership of Northern Michigan and Superior Technologies, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 4604, 4607 ¶ 8 (WTB 2000); see also 47 C.F.R. § 0.406 (“Persons having business with the Commission should familiarize themselves with those portions of its rules and regulations pertinent to such business.”).

²⁹ *Auction Closes Public Notice*, 15 FCC Rcd at 13766-71.

³⁰ See Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 9 FCC Rcd 6384, 6386 ¶ 12 (CCB 1994).

the application will be dismissed immediately in accordance with Section 1.2107(c) of the Commission's Rules.³¹

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.925(b)(3) of the Commission's Rules, 47 C.F.R. § 1.925(b)(3), that the request to waive Sections 1.919, 1.2107(e), 1.2110(i), and 1.2112 of the Commission's Rules, 47 C.F.R. §§ 1.919, 1.2107(e), 1.2110(i), 1.2112, filed by C & W Systems, Ltd. on May 26, 2000 IS DENIED.

11. IT IS FURTHER ORDERED pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.925(b)(3) of the Commission's Rules, 47 C.F.R. § 1.925(b)(3), that on our motion a waiver of Sections 1.919, 1.2107(e), 1.2110(i), and 1.2112 of the Commission's Rules, 47 C.F.R. §§ 1.919, 1.2107(e), 1.2110(i), 1.2112, IS GRANTED.

12. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

³¹ 47 C.F.R. § 1.2107(c).