



FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

DA 01-437
February 16, 2001

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Carl W. Northrop
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Re: Harbor Wireless LLC Request for Waiver of Section
1.2109(b) of the Commission's Rules (Auction No. 33)

Dear Messrs. Mason, Northrop, and Ball:

This letter responds to the Request for Waiver¹ and Supplement To Request for Waiver² filed by Harbor Wireless, LLC ("Harbor"). Harbor seeks a waiver of Section 1.2109(b) of the Commission's rules, which permits the Commission to offer a license to the next highest bidders (in descending order) if a winning bidder withdraws its bid after close of the auction.³ Specifically, Harbor argues that the Commission should offer to Harbor three licenses on which it held the high bid prior to submission and withdrawal of higher bids by another bidder prior to close of the auction.⁴ According to Harbor, it had standing high bids on these licenses⁵ until Pegasus

¹ Harbor Wireless LLC Request for Waiver (filed September 26, 2000) ("Waiver Request").

² Harbor Wireless, LLC Supplement to Request for Waiver (filed September 28, 2000) ("Supplement"). According to Harbor, the chart included in this filing identifies the previous high bidder and the amount of the prior bid for all eight markets in which the high bids were withdrawn and no subsequent bids were received. *See* Supplement at 1-2.

³ *See* 47 C.F.R. § 1.2109(b).

⁴ *See* Waiver Request at 1.

⁵ The licenses include B Block licenses Major Economic Areas 14 (Columbus, Ohio), 34 (Omaha, Nebraska), and 48 (Hawaii), collectively referred to as the "Licenses."

Guardband LLC (“Pegasus”) outbid Harbor.⁶ Pegasus later withdrew its standing high bids, but Harbor, by that time, lacked sufficient unused eligibility to bid on the Licenses.⁷ No other bidder for the Licenses emerged. The auction closed with the Licenses unsold.⁸ For the reasons discussed below, we deny Harbor’s Waiver Request.

To obtain a waiver of the Commission’s competitive bidding rules,⁹ Harbor must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.¹⁰ Harbor argues that a waiver is appropriate in this instance because the facts and circumstances pertaining to the Licenses and Pegasus’ withdrawal are unique.¹¹

Harbor contends that the public interest would be served by grant of a waiver to offer Harbor the licenses on which it was the second highest bidder prior to the bid withdrawals by Pegasus.¹² Harbor argues that grant of its request would serve the same purpose that is served by the rule allowing the Commission to offer licenses to the second highest bidder where withdrawal or default occurs after the auction.¹³

⁶ Waiver Request at 2.

⁷ *Id.*

⁸ Waiver Request at 2. *See* “700 MHz Guard Bands Auction Closes; Winning Bidders Announced,” Public Notice, DA 00-2154 (rel. September 25, 2000).

⁹ *See* 47 C.F.R. § 1.2109(b).

¹⁰ *See* 47 C.F.R. § 1.925.

¹¹ *See* Waiver Request at 12.

¹² *See* Waiver Request at 5-11. With respect the other five licenses for which high bids were withdrawn and no subsequent bids were received, Harbor suggests, without specifically requesting, that the Commission also offer such licenses to the previous high bidders to eliminate the need for a second auction of Guard Band licenses. *Id.* at 8.

¹³ *See* Waiver Request at 3, 5-11.

In this regard, Harbor claims that the Commission has indicated that it would exercise its discretion to offer licenses to the previous high bidders, rather than conduct a re-auction, in circumstances involving a relatively small number of low value licenses which arise only a short

time after the initial auction.¹⁴ Harbor also notes that the Commission considered amending Section 1.2109(b) to revise or eliminate the next highest bidder option, but declined to do so. Rather, the Commission reserved the discretion to either award the licenses to the next highest bidder or re-auction the spectrum thereby ensuring that it is in the best possible position to determine which option serves the public interest in each situation.¹⁵ Harbor cites several public interest considerations in support of its position.

First, Harbor argues that the small number of licenses involved, eight out of 104 licenses initially offered, does not justify the expense and delay associated with a holding a second auction.¹⁶ Next, Harbor asserts that the Licenses do not cover major markets, and thus have relatively low values.¹⁷ According to Harbor, the fact that the Licenses are in geographic areas with small populations explains why other bidders that, unlike Harbor, had sufficient eligibility to bid after the Pegasus withdrawal, chose not to do so.¹⁸ Third, Harbor claims that its Waiver Request is so close in time to when the withdrawals occurred that the Commission should not be concerned that changes in market conditions render the market prices established in the auction invalid.¹⁹ Fourth, Harbor asserts that its proposal will expedite service to the public, and prevent the Licenses from lying fallow until the Commission can conduct an auction.²⁰ Fifth, Harbor argues that it expects the issues of incumbent licensee protection and band clearing to be

¹⁴ *Id.* at 6. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2374 n.115 (1994) ("*Competitive Bidding Second Report and Order*"); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, WT Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd 2941, 2962 n.30 (1994) ("*Competitive Bidding Third Report and Order*").

¹⁵ See Waiver Request at 7; Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 461-62 ¶ 152 (1997) ("*Part 1 Third Report and Order*").

¹⁶ *Id.* at 8.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Waiver Request at 8-9.

²⁰ *Id.* at 9. Harbor also argues that by awarding it the three license, the Commission would avoid any administrative expense associated with a second auction. *Id.*

addressed on a broad industry-wide basis and therefore, it will be disadvantaged if it cannot participate in discussions of these issues from the outset.²¹ Further, Harbor contends that because

the two Guard Band Managers licensed in each MEA are in competition, if their licenses are not awarded concurrently, the entity that is granted its license later will be at a competitive disadvantage.²² Harbor also claims that necessary coordination with public safety frequency coordinators and adjacent area Guard Band Managers will be facilitated if all licensees are identifiable at the outset.²³ Finally, Harbor asserts that grant of a waiver entails no risk because Harbor has sufficient funds on deposit with the Commission to pay for the Licenses.²⁴

We decline to grant Harbor's request for waiver of Section 1.2109(b). We find that the circumstances of Harbor's waiver request fail to meet the Commission's standard for granting a waiver. Harbor's lack of sufficient unused eligibility to bid on the Licenses does not rise to the level of a unique or unusual circumstance, warranting special consideration by the Commission. We also reject Harbor's argument that the small number of licenses involved does not justify holding a second auction. When the Commission first adopted rules governing the default of an auction winner, it stated, as a general rule, that the best course of action would be to re-auction the spectrum.²⁵ In the *Competitive Bidding Second Report and Order*, the Commission noted that one of its primary concerns is that licenses be awarded to the parties that value them most highly, and in the situation of a winning bidder's withdrawal after the close of an auction, this can best be assured through a re-auction.²⁶ In the *Part 1 Third Report and Order*, the Commission considered revisions to Section 1.2109(b) and decided to reserve discretion to either re-auction the spectrum associated with a defaulted license or offer it to the other highest bidders (in descending order) at their final bids.²⁷ However, the Commission noted that offering spectrum associated with a defaulted license to the next highest bidder at its final bid may not ensure that the license will be awarded to the bidder who values it most highly.²⁸ In particular, as the license is offered to bidders at the next highest bids, other parties can argue that they would pay more for

²¹ Waiver Request at 9-10.

²² Waiver Request at 10.

²³ *Id.*

²⁴ *See* Waiver Request at 11.

²⁵ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383 ¶ 204.

²⁶ *Id.*

²⁷ *Part 1 Third Report and Order*, 13 FCC Rcd at 461-62 ¶ 152.

²⁸ *Id.* at 462 ¶ 153.

the license if given the opportunity.²⁹ When more than one license is being auctioned, aggregation strategies may shift

during the course of the auction, affecting the value placed on any individual license by a particular bidder.³⁰

We have not identified any case where an applicant has made a convincing showing that the Bureau should, in the context of a withdrawal that occurred *after* the auction closed, exercise its discretion under Section 1.2109(b) to offer unsold licenses to the next highest bidder. Therefore, we are unconvinced that the Bureau should waive Section 1.2109(b) to offer unsold licenses to the next highest bidder when a bidder withdraws its high bid *before* the close of an auction. We do not accept Harbor's speculation that there were other bidders that had eligibility, but chose not to submit a bid at that point in the auction. Harbor has not adequately addressed the issue of whether other bidders may have based their bidding strategy on a plain reading of Section 1.2109(b), nor has Harbor addressed whether there are bidders similarly situated to Harbor, who may have wanted the opportunity to change their bidding strategy in light of Pegasus' withdrawals. Waiver of Section 1.2109(b) after the auction to offer Harbor licenses on which Harbor lacked sufficient unused eligibility to bid after Pegasus' withdrawal would be unfair to other bidders that might otherwise have bid on those licenses. Such action by the Bureau could undermine the integrity of the auction process.³¹

Moreover, we disagree with Harbor's assertion that its proposal will expedite service to the public, as well as its assertion that it will be at a disadvantage with respect to participating in negotiation of band clearing agreements, coordinating frequencies, and competing with other Guard Band Managers if the Licenses are not awarded concurrently with those won in Auction No. 33. As the auction of the eight Guard Band licenses left unsold in Auction No. 33 began on February 13, 2001, the period between the grant of licenses won in the first and second Guard Band auctions will not be so significant as to have the deleterious effects that Harbor suggests. Lastly, Harbor has not shown that it has no reasonable alternative to the grant of its waiver request. Harbor has a clear alternative because it is a qualified bidder in the second Guard Band auction (Auction No. 38), which began on February 13, 2000.³²

²⁹ *Id.*

³⁰ *See id.*

³¹ *See In the Matter of Two Way Radio of Carolina, Inc. Memorandum Opinion and Order*, FCC 99-189, 14 FCC Red 12035, 12041, ¶ 11 (1999).

³² *See* "Auction of Licenses for the 700 MHz Guard Bands; 5 Qualified Bidders," Public Notice, DA 01-258 (rel. February 2, 2001) ("Auction No. 38 Qualified Bidders Public Notice").

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Accordingly, Harbor's Waiver Request is denied. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's Rules.³³

Sincerely,

Kathleen O'Brien Ham
Deputy Chief, Wireless Telecommunications Bureau

³³ 47 C.F.R. § 0.331.