

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

In the Matter of Highland Cellular, Inc.)
Request for Waiver of) File No. 0000012881
47 C.F.R. § 1.2105(b)(2))

ORDER

Adopted: April 4, 2001

Released: April 6, 2001

By Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. By this Order, the Commercial Wireless Division (CWD) of the Wireless Telecommunications Bureau (WTB) denies Highland Cellular, Inc.'s (Highland) Petition for Reconsideration1 of CWD's denial of Highland's request for waiver of section 1.2105(b)(2) of the Commission's rules.2 CWD also denies Highland's alternative request for a "remedial" bidding credit equal to 25 percent of its high bids and refund of any "overpayments."3 Highland, a winning bidder of four licenses in Auction No. 22, the C, D, E, and F block broadband PCS auction that closed on April 15, 1999, requested a waiver of section 1.2105(b)(2) to change its designated entity status from "small business" to "very small business" subsequent to the close of the auction. Alternatively, Highland requested a "remedial" bidding credit equal to 25 percent of its high bids and a refund of overpayments.

2. Under section 24.720(b) of the Commission's rules, among the entities eligible to bid in Auction No. 22 were two categories of small businesses: (1) small businesses, which are entities that, together with their affiliates and persons or entities that hold interests in such entities and their affiliates, have average

1 Highland Cellular, Inc. Petition for Reconsideration, File No. 0000012881 (filed Oct. 1, 1999) (Petition for Reconsideration).

2 See In the Matter of Highland Cellular, Inc. Request for Waiver of 47 C.F.R. § 1.2105(b)(2), Order, 15 FCC Rcd. 6752 (CWD 1999) (Order).

3 See Highland Cellular, Inc. Supplement to Petition for Reconsideration, File No. 0000012881 (filed June 23, 2000) (Supplement). As used by Highland, the term "overpayment" refers to the difference between the 15 percent small business credit that has already been applied and the 25 percent very small business remedial credit that Highland claims should be applied. Highland claims that a remedial bidding credit will remedy the alleged discrimination it has faced.

We note that section 1.106(f) of the Commission's rules, 47 C.F.R. § 1.106(f), requires that a petition for reconsideration and any supplement thereto must be filed within 30 days of the date of public notice of the Commission's action. The section specifically states that, "[n]o supplement or addition to a petition for reconsideration which has not been acted upon by the Commission or by designated authority, filed after expiration of the 30 day period, will be considered except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefor." Id. Highland did not seek leave in a separate pleading to file its Supplement to Petition for Reconsideration (which was submitted nearly nine months after petitions for reconsideration of the Order were due). The Supplement raises no new substantive arguments but only an alternative form of relief, which we consider and reject.

annual gross revenues that do not exceed \$40 million for the preceding three years,⁴ and (2) very small businesses, which are entities that, together with their affiliates and persons or entities that hold interests in such entities and their affiliates, have annual gross revenues that do not exceed \$15 million in each of the preceding three years.⁵ Small businesses were eligible for a 15 percent bidding credit in Auction No. 22, while very small businesses were eligible for a 25 percent bidding credit.⁶

3. On its short-form application (FCC Form 175) to bid in Auction No. 22, Highland stated that it qualified as a small business, with gross income of not more than \$40 million.⁷ Highland was the high bidder in four markets and subsequently submitted its long-form application (FCC Form 601), accompanied by a request for waiver of section 1.2105(b)(2).⁸ In its waiver request, Highland, a subchapter S corporation, claimed that in calculating its average annual gross revenues for the short-form application, it erroneously counted the personal income of its majority shareholder, part of which was derived from Highland.⁹ Highland stated that inclusion of its majority shareholder's personal income caused its average annual gross revenues to exceed the \$15 million very small business threshold.¹⁰ Highland contended that, if it had calculated its average annual gross revenues using generally accepted accounting principles (GAAP), it would not have included the majority shareholder's personal income and would have met the definition of a very small business and should therefore receive a 25 percent bidding credit.¹¹ Further, Highland stated that when its annual gross revenues were calculated using FCC guidance set forth in a 1998 *Public Notice*, it would also meet the definition of a very small business.¹²

4. The *Order* determined that Highland's effort to change its filing status from small business to very small business amounted to a major amendment that would not be permitted absent a waiver.¹³ The *Order* further found that a waiver was not warranted in this case because Highland had failed to show unique circumstances.¹⁴

⁴ 47 C.F.R. § 24.720(b)(1).

⁵ 47 C.F.R. § 24.720(b)(2).

⁶ 47 C.F.R. §§ 24.712, 24.717.

⁷ Highland Cellular Inc., FCC Form 175, Exhibit C (Small Business Status) (filed Feb. 12, 1999).

⁸ Highland Cellular Inc., FCC Form 601, Exhibit G (Waiver Request) (filed May 4, 1999) (Waiver Request). Highland Cellular was the winning bidder for C block licenses in markets BTA143, BTA201, BTA255, and BTA444.

⁹ Waiver Request at 1.

¹⁰ *Id.* at 1-2.

¹¹ *Id.*

¹² *Id.*, citing Wireless Telecommunications Bureau Responds to Questions About the Local Multipoint Distribution Service Auction, *Public Notice*, 13 FCC Rcd. 341 (1998) (1998 Public Notice).

¹³ *Order*, ¶ 4.

¹⁴ *Id.*

5. Initially, we confirm that modification of an applicant's small business status constitutes a major change to its application.¹⁵ Highland and other applicants for Auction No. 22 were informed that they would not be able to make major amendments to their short-form applications after the February 12, 1999 short form filing deadline.¹⁶ Thus, for Highland to submit its amendment and to convert its bidding status requires a grant of waiver of the Commission's rules. Under section 1.925 of the Commission's rules, a waiver may be granted if it is shown that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative.¹⁷

6. Highland asserts in its Petition for Reconsideration that CWD erred as a matter of fact and law in denying its waiver request.¹⁸ Highland argues that its erroneous inclusion of its majority shareholder's personal income in the calculation of annual gross revenues, which led to its original self-classification as a small business instead of a very small business, constitutes a "unique circumstance" under section 1.925, warranting waiver of section 1.2105(b)(2) of the Commission's rules. We disagree. The Commission has found that errors of this nature do not amount to a unique circumstance warranting waiver of the Commission's rules. For example, in *ClearCall*, an auction applicant erroneously double-counted the personal income of a shareholder in its calculation of average annual gross revenues, resulting in its self-classification as a small business instead of a very small business.¹⁹ ClearCall, Inc. (ClearCall) likewise sought in its long-form application to change its calculations and requested a waiver of section 1.2105(b)(2) to revise its bidding credit status, arguing, *inter alia*, that the attribution rules were unclear.²⁰ The Bureau found that waiver of the rule was not justified because the error on ClearCall's short form was not the result of ambiguity in the rules or a too short filing period, but the result of ClearCall's calculation method.²¹ The Bureau specifically stated that the error in calculation of average annual gross revenues did not present a unique circumstance.²²

¹⁵ See *In the Matter of ClearCall, Inc. Request for Waiver of 47 C.F.R. § 1.2105(b)(2)*, *Order*, 12 FCC Rcd. 965 (1997) ("*ClearCall*") ("because of the significant benefits that the two small business categories confer on winning bidders, modification of an applicant's small business status does not constitute a minor change within the meaning of Section 1.2105(b)(2)").

¹⁶ See *Auction of C, D, E, and F Block Broadband PCS Licenses*, *Public Notice*, DA 98-2604, at 18 (rel. Dec. 23, 1998); *FCC Auction, C, D, E, & F Broadband PCS Auction*, BTA – Basic Trading Area, March 23, 1999 Bidder Information Package at 111 ("Auction No. 22 Bidder Information Package"), citing 47 C.F.R. § 1.2105 (which permits auction applicants to amend or modify their short-form applications to make minor changes or correct minor errors).

¹⁷ 47 C.F.R. § 1.925. Highland's citation to section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, does not alter our analysis, since the applicable standard is set forth in section 1.925.

¹⁸ Petition for Reconsideration at 1.

¹⁹ See *ClearCall, Inc.*, 12 FCC Rcd at 967-68.

²⁰ *Id.* at 968-69.

²¹ *Id.* at 970-71.

²² *Id.*

7. The Commission similarly denied a waiver in another case involving a miscalculation that affected the applicant's bidding status. In *Two Way Radio of Carolina Inc.*,²³ the applicant determined that it had incorrectly included an affiliate in its Form 175 application, causing its annual gross revenues to exceed the \$3 million small business category for Auction No. 7. The applicant sought to change its designated entity status at the Form 601 phase, and sought waiver of section 1.2105(b)(2) to facilitate the change. The Commission found that a waiver of the rules was not warranted because the applicant did not demonstrate unique circumstances warranting waiver.

8. We likewise find that Highland's inclusion of its majority shareholder's personal income in calculating average annual gross revenues does not present a unique circumstance warranting waiver of the Commission's rules. Compliance with the Commission's rules and proper calculation of gross income were matters that confronted every applicant in Auction No. 22 (and in every other auction permitting the award of bidding credits based on applicant size). The fact that Highland's Form 175 contained an error that other applicants did not make does not render Highland's situation "unique," and does not warrant a waiver.

9. Highland also argues that a waiver of the rules is justified because its initial mistaken calculation was the result of alleged ambiguity in the Commission's attribution rules.²⁴ Highland contends that a strict adherence to section 24.709 of the Commission's rules²⁵ led to its counting the majority shareholder's personal income, and that it was not clear, until May of 1999, that personal income was considered part of net worth and therefore not attributable for purposes of calculating average annual gross revenues.²⁶ Highland further highlights the Commission's 1998 *Public Notice* as helping to fuel the confusion about the requirements of the rules. We disagree that the Commission's rules created ambiguity on this issue. Highland was on notice of the appropriate attribution rules prior to the February 12, 1999 short form filing deadline. In December 1997, the Commission stated that when an applicant does not have audited financial statements, its gross revenues must be certified by its chief financial officer or its equivalent and must be prepared in accordance with GAAP.²⁷ Highland itself relied on GAAP in its request for waiver, arguing that application of GAAP resulted in the lower annual gross income figure for Highland.²⁸ Also, in a 1997 letter to John Prendergast, Esq., CWD stated that personal net worth requirements for applicants,

²³ In the Matter of Two Way Radio of Carolina, Inc. Request for Waiver of 47 C.F.R. § 1.2105(b)(2), *Order*, 14 FCC Rcd. 12035 (1999) ("*Two Way Radio of Carolina*"), *recon. denied*, 15 FCC Rcd. 11,442 (2000).

²⁴ Petition for Reconsideration at 5-6.

²⁵ 47 C.F.R. § 24.709.

²⁶ Petition for Reconsideration at 5, citing In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd. 10,030 (1999).

²⁷ In the Matter of Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Notice of Proposed Rulemaking*, 13 FCC Rcd. 374 (1997).

²⁸ Waiver Request at 1; Petition for Reconsideration at 2-3.

attributable investors, and affiliates were eliminated, and therefore the personal income of shareholders did not have to be included in the calculation of gross revenues.²⁹

10. Indeed, the very public notice that Highland now cites in its Petition for Reconsideration as creating some of the confusion as to the inclusion of shareholder personal income in calculating gross revenue is the public notice that Highland relied upon to support its initial Waiver Request. As noted by Highland, that public notice stated that, “[i]n other services (*i.e.*, broadband PCS), the Commission eliminated a personal net worth test, concluding that ‘the affiliation rules make the personal net worth rules largely unnecessary since most wealthy individuals are likely to have their wealth closely tied to ownership of another business.’”³⁰ We note that the same public notice reiterated that “[t]he Commission will evaluate applicants’ gross revenues as they are reflected in financial statements prepared in accordance with generally accepted account principles.”³¹

11. Auction No. 22 applicants were charged with knowledge of applicable Commission rules, relevant orders, and public notices.³² Therefore, Highland cannot, at this point, claim that its uncertainty about Commission rules justifies granting the requested waiver. If Highland had questions regarding the proper calculations, it could have made those inquiries at the Commission’s February 3, 1999 seminar for Auction No. 22, or contacted the Commission prior to filing its short-form application. Highland states that other applicants in Auction No. 22 did not attribute personal income on their short-form applications;³³ therefore, it is reasonable to conclude that other applicants in Auction No. 22 understood, based on the information equally available to Highland, that personal income was not attributable for the purposes of calculating average annual gross revenues. We find that Highland was on notice of the appropriate attribution rules and waiver of section 1.2105(b)(2) is not warranted.

12. We also reject Highland’s argument that grant of a waiver in this case would not affect the integrity and efficient functioning of the Commission’s auction process.³⁴ If the Commission were to allow winning bidders to amend their applications to obtain more favorable bidding credit treatment after the close of an auction, it would be possible for a bidders to use the amendment process as a mechanism to gain unfair advantage over other bidders during the auction bidding.³⁵ An applicant’s bidding credit status impacts the strategies of other bidders in that auction. Allowing an applicant to change its bidding credit

²⁹ Letter to John Prendergast, Esq., 12 FCC Rcd. 1346 (1997). Brookings Municipal Utilities sought waiver of section 24.709(b) so that its board members’ personal income and assets would not have to be disclosed. The Commission determined that the petition was moot due to the elimination of the net worth limitation.

³⁰ *1998 Public Notice*, 13 FCC Rcd. at 346.

³¹ *Id.* at 345.

³² Auction No. 22 Bidder Information Package, tab G at 1.

³³ *See Supplement* at 2-3.

³⁴ Petition for Reconsideration at 6-7. We likewise rejected a similar argument in *Two Way Radio of Carolina, Inc.* An applicant’s designated entity status has an effect on other bidders’ strategies.

³⁵ *Two Way Radio of Carolina*, 14 FCC Rcd. at 12,043.

status after it wins licenses in an auction would undermine the integrity and fairness of the auctions process.³⁶

13. In the alternative, Highland seeks a “remedial” bidding credit³⁷ equal to 25 percent of its winning bid and a refund of all overpayments. Highland contends that it was treated differently from other applicants in Auction No. 22 that [correctly] chose not to attribute personal income, giving those applicants an alleged unfair advantage over it.³⁸ Highland again argues that ambiguity in the Commission’s attribution rules caused it to erroneously include the personal income of its majority shareholder in its calculation of average annual gross revenue.³⁹ As stated above, the attribution rules were clear prior to the Auction No. 22 short form filing period. We find no merit to Highland’s argument that it has been discriminated against. Any difference in treatment was the result of Highland’s accounting methodology. We find that the Commission did not discriminate against Highland and therefore deny the alternative relief sought.

14. For the reasons stated above, we find that Highland Cellular, Inc. has failed to show that it is entitled to the relief requested and we reaffirm the denial of Highland Cellular, Inc.’s Waiver Request. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 0.331 and 1.106 of the Commission’s rules, 47 C.F.R. § 0.331, 1.106, that the Petition for Reconsideration filed by Highland Cellular Inc. on October 1, 1999, and the Supplement to the Petition for Reconsideration filed June 23, 2000 ARE DENIED.

Federal Communications Commission

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³⁶ *See id.*

³⁷ *See note 2, supra.*

³⁸ Supplement at 2-3.

³⁹ *Id.* at 2.