



Federal Communications Commission
Washington, D.C. 20554

DA 02-1745
July 18, 2002

Via Certified Mail, Return Receipt Requested

Thomas J. Dougherty, Jr.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, DC 20005

Dear Mr. Dougherty:

This letter responds to a petition filed on behalf of FlexCom Mobile, L.L.C. ("FlexCom") seeking reconsideration of the Wireless Telecommunications Bureau's ("Bureau") decision to return as unacceptable for filing a short-form application (FCC Form 175) that was prematurely submitted by FlexCom.¹ For the reasons discussed below, we deny FlexCom's Petition.

On December 4, 2000, FlexCom filed an FCC Form 175 Application to Participate in an FCC Auction. According to the cover letter accompanying its short-form application, FlexCom sought licenses to provide 24 GHz Radio Service.² At the time FlexCom filed its short-form application, the Bureau had not yet announced either a date for the auction of licenses in the 24 GHz service or a filing window for the submission of short-forms. Accordingly, the Bureau returned as unacceptable for filing FlexCom's short-form application with a letter stating that the "frequencies are scheduled to be auctioned in the near future, however, no specific auction date has yet been set."³ FlexCom now seeks reconsideration of the Bureau's action.

In its Petition, FlexCom contends that, notwithstanding the lack of an auction date, the 24 GHz channels listed in its short-form application became available on December 4, 2000.⁴ FlexCom further asserts that it was entitled to submit its short-form application on December 4, 2000, under Commission rules that became effective on that date.⁵

¹ Petition for Reconsideration filed by Thomas J. Dougherty, Jr., Russ Taylor, counsel for FlexCom, dated December 22, 2000 ("Petition").

² Letter from Russ Taylor, counsel for FlexCom, to the Federal Communications Commissions, dated December 4, 2000. Because FlexCom did not file its application electronically, as required by 47 C.F.R. § 1.2105(a) of the Commission's rules, FlexCom created an attachment listing the Economic Areas ("EA") and channels for each EA in which it had an interest.

³ Letter from Kathryn M. Garland, Chief, Auctions Operations Branch, Auctions & Industry Analysis Division, Wireless Telecommunications Bureau, to Russ Taylor, counsel for FlexCom, dated December 8, 2000.

⁴ Petition at 2.

⁵ *Id.* at 1.

We reject FlexCom's assertion that the effective date of service rules for the 24 GHz frequencies opens the window for filing short-form applications. In the *24 GHz Report and Order*, the Commission did not establish the effective date of the service rules as the date for filing applications for 24 GHz service licenses.⁶ Rather, it adopted a geographic licensing scheme and the Part 1 competitive bidding rules to resolve any mutually exclusive license applications.⁷ The Part 1 rules include Section 1.2105(a), which states that the Commission will specify by public notice a date on which short-form applications may be filed.⁸ Specifically, Section 1.2105(a) provides that short-form applications are due to be filed "(i) [o]n the date(s) specified by public notice; or (ii) [i]n the case of application filing dates which occur automatically by operation of law . . . on a date specified by public notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists."⁹ Thus, a date specified by public notice, not the date on which the service rules became effective, will mark the beginning of the short-form application filing period for 24 GHz licenses. The Commission has not yet specified by public notice the date for filing short-form applications in the 24 GHz service. Nor has an "application filing date[] . . . occur[ed] automatically by operation of law" with respect to 24 GHz radio service frequencies.

Because the Bureau had not yet scheduled an auction at the time FlexCom filed its short-form application, nor announced the beginning of the filing period for such applications, FlexCom's submission of its short-form application was premature.¹⁰ Furthermore, FlexCom filed its short-form application manually, even though the Commission's Part 1 rules require that short-forms be filed electronically.¹¹ The Commission has not waived the electronic filing requirement for the 24 GHz service, and thus FlexCom's short-form application was unacceptable for filing on this ground as well.

In its Petition, FlexCom argues that the "Bureau has improperly placed the 'auction-cart' in front of the 'mutually exclusive-horse.'"¹² FlexCom contends that because the Bureau has not alleged that FlexCom's application is mutually exclusive with other applications, it cannot resolve

⁶ See Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, 15 FCC Rcd 16,934 (2000) ("*24 GHz Report and Order*").

⁷ *24 GHz Report and Order*, 15 FCC Rcd 16,934, 16,941-16,942 at ¶¶ 12-13, 16,965 at ¶¶ 71-72 (2000). The Part 1 competitive bidding rules are codified at 47 C.F.R. §§ 1.2101 *et seq.*

⁸ 47 C.F.R. § 1.2105(a)(1). See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2376, ¶ 164 (1994) ("*Competitive Bidding Second Report and Order*") ("We will not accept applications filed before or after the dates specified in Public Notices.") (footnote omitted).

⁹ 47 C.F.R. § 1.2105(a)(1).

¹⁰ Notwithstanding that FlexCom filed an application to participate in an auction, FlexCom entered "N/A" in the space on the application where an Auction Number was required, thereby acknowledging that no auction had yet been scheduled.

¹¹ 47 C.F.R. § 1.2105(a).

¹² Petition at 2.

FlexCom's short-form application by competitive bidding.¹³ Consistent with Section 1.2105(a), as discussed above, the Commission will determine whether mutual exclusivity exists only after it has specified a date by public notice by which short-form applications may be filed and has accepted for filing such applications. The Commission will not determine mutual exclusivity at whatever random point in time a potential bidder, such as FlexCom, decides to submit a short-form application.¹⁴ FlexCom's premature submission of its short-form application is, in effect, an attempt to reject the licensing scheme that the Commission expressly selected for the 24 GHz service and replace it with a first-come first-served licensing scheme. We reject any effort by potential applicants to impose a particular licensing scheme on a service for which the Commission already has adopted a scheme.

FlexCom's premature short-form application also may reflect an interest in acquiring licenses to provide 24 GHz Radio Service irrespective of when or how the licenses are assigned. As noted earlier, the Commission will assign licenses for the 24 GHz Radio Service pursuant to its competitive bidding rules. Consistent with all the statutory objectives of competitive bidding, such as promoting efficient and intensive use of electromagnetic spectrum,¹⁵ the Commission considers expressions of such interest in preparing for auctions.

For the reasons discussed above, it would have been contrary to the Commission's rules for the Bureau to process FlexCom's short-form application prior to specifying by public notice the filing period for such applications. Therefore, we conclude that the Bureau properly dismissed FlexCom's short-form application.¹⁶ Accordingly, FlexCom's Petition is denied. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's rules.¹⁷

Sincerely,

Margaret Wiener
Chief, Auctions & Industry Analysis Division
Wireless Telecommunications Bureau

¹³ *Id.*

¹⁴ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2376, ¶¶ 164-65 (1994) ("Applications submitted before release of a Public Notice announcing an auction for particular license(s), or before the opening date of the filing window specified therein, will be returned as premature. . . . If the Commission receives only one application that is acceptable for filing for a particular license . . . the Commission will issue a Public Notice canceling the auction for this license and establishing a date for the filing of a long-form application.").

¹⁵ 47 U.S.C. §309(j)(3)(D).

¹⁶ Letter from Kathryn M. Garland, Chief, Auctions Operations Branch, Auctions & Industry Analysis Division, Wireless Telecommunications Bureau, to Russ Taylor, counsel for FlexCom, dated December 8, 2000.

¹⁷ 47 C.F.R. §0.331.