



Federal Communications Commission  
Washington, D.C. 20554

June 16, 2003

DA 03-1960

**Via certified mail, return receipt requested**

Mr. Jay N. Lazrus, Esq.  
Myers Lazrus Technology Law Group  
1220 19<sup>th</sup> St., N.W., Suite 500  
Washington, D.C. 20036

**Re: Remedial Bidding Credit for Auction No. 2**

Dear Mr. Lazrus:

This letter responds to your request filed on behalf of Charleston Interactive Technologies, LLC ("Charleston")<sup>1</sup> seeking a waiver of the Commission's procedures for providing refunds generated by the retroactive bidding credit applied to the accounts of certain winning bidders in the *218-219 MHz Report and Order*.<sup>2</sup> Specifically, Charleston alleges that the Commission should waive the payment procedures established with respect to such refunds and allow it to apply for the refund in lieu of InterVision Communications Technologies, Inc. ("ICTI"). For the reasons set forth below, we deny Charleston's request for a waiver.

Background

On July 28 and 29, 1994, the Commission conducted an auction for licenses in the 218-219 MHz Service ("Auction No. 2").<sup>3</sup> The competitive bidding rules for that service provided bidding credits for minority- and/or women-owned entities.

On September 10, 1999, the Commission released the *218-219 MHz Report and Order*, which eliminated from the Commission's rules the bidding credit for women- and minority-

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<sup>1</sup> Letter from Jay N. Lazrus, Counsel for Charleston Interactive Technologies, LLC to Mary Schultz, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, dated February 12, 2002 ("*Lazrus Letter*").

<sup>2</sup> Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum and Opinion and Order*, 15 FCC Rcd 1497, 1533-55, ¶¶ 61-64 (1999) ("*218-219 MHz Report and Order*").

<sup>3</sup> The 218-219 MHz Service was formerly known as the Interactive Video Data Service ("IVDS"). Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, Mimeo No. 44160 (rel. August 2, 1994) ("*Auction No. 2 Closing PN*"); Erratum to August 2, 1994 Public Notice Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, Mimeo No. 44265 (rel. August 9, 1994).

owned businesses previously offered in Auction No. 2.<sup>4</sup> At the same time, the Commission applied a retroactive twenty-five percent bidding credit to “every winning bidder in Auction No. 2 that met the small business qualifications for that auction.”<sup>5</sup> The Commission delegated the authority to implement the provisions in the *218-219 MHz Order* to the Wireless Telecommunications Bureau (“Bureau”) and the Office of Managing Director (“OMD”).<sup>6</sup>

On February 15, 2001, the Bureau and OMD exercised their delegated authority and issued a *Refund Procedures PN* explaining the procedures for requesting a refund based upon the *218-219 MHz Order*.<sup>7</sup> As explained in the *Refund Procedures PN*, refunds generated by the remedial bidding credit are only to be paid to the payor of record of the upfront, first, and second down payments.<sup>8</sup> The *Refund Procedures PN* instructed that the payor of record must make its request for a refund in writing to the Commission.<sup>9</sup>

Charleston was not a participant in Auction No. 2. Rather, ICTI was a participant in Auction No. 2 and was the winning bidder for the MSA 90, A block license located in the Charleston-North Charleston, South Carolina market.<sup>10</sup> Charleston is not the payor of record for ICTI’s upfront, first or second down payments. In this particular instance, Charleston alleges that it was an investor in ICTI and that ICTI defrauded Charleston of several million dollars.<sup>11</sup> As discussed below, under the *Refund Procedures PN*, Charleston is ineligible for any refund generated as a result of the retroactive bidding credit.

### Discussion

The *Refund Procedures PN* established that the payor of record of the upfront, first, and second down payment apply for a refund generated by the retroactive bidding credit.<sup>12</sup> As a matter of precedent, the Commission has determined that the payor of record is the appropriate

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<sup>4</sup> *218-219 MHz Report and Order*, 15 FCC Rcd at 1533-55, ¶¶ 61-64; 47 C.F.R. § 95.816(d) (1994).

<sup>5</sup> *218-219 MHz Order*, 15 FCC Rcd at 1533-34, ¶ 61; 47 U.S.C. § 309(j); 47 C.F.R. § 95.816(e).

<sup>6</sup> *218-219 MHz Order*, 15 FCC Rcd at 1529, ¶ 54.

<sup>7</sup> 218-219 MHz Service (formerly known as IVDS) Refund Procedures, *Public Notice*, 16 FCC Rcd 3453 (2001) (“*Refund Procedures PN*”).

<sup>8</sup> *Refund Procedures PN*, 16 FCC Rcd at 3453.

<sup>9</sup> *Id.*

<sup>10</sup> *Auction No. 2 Closing PN*.

<sup>11</sup> *Lazrus Letter* at 1 (citing attachment, Letter from David P. Frankel, Senior Staff Attorney, Federal Trade Commission to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated January 25, 2002).

<sup>12</sup> *Refund Procedures PN*, 16 FCC Rcd at 3453.

entity to apply for any refunds generated as a result of the auctions process.<sup>13</sup> To allow otherwise, would contravene the well established principle that the Commission does not involve itself in the private arrangements, or disputes that may arise from such arrangements, that may exist between the payor of record and other parties.<sup>14</sup> Further, the refund procedures employed here, and those generally employed by the Commission with respect to auctions, are also consistent with the well-established tenet that the Federal Government should deal exclusively with the original claimant in any matter thereby avoiding the difficulties attendant to investigating the validity of purported transfer or assignments of claims.<sup>15</sup> These principles avoid the risk of double payment or multiple liability.

Charleston has not met the Commission's standard for granting a waiver.<sup>16</sup> The circumstances presented here, in fact, establish the very necessity of procedures adopted and therefore show that application of the rule serves its underlying purpose. Similarly, Charleston has not shown that the facts it alleges render application of the rule inequitable, burdensome, or otherwise contrary to the public interest, or that Charleston has no reasonable alternative. Also, it is not apparent that Charleston has contacted the payor of record, who, under our rules, would have an interest in this matter. Finally, the Commission is not the appropriate forum for determining the validity of the allegations made by Charleston, nor is it the appropriate forum for determining if there are any other parties with similar allegations pertaining to the refund at issue

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<sup>13</sup> Entertainment Unlimited, Inc. Request for Refund of Late Payment Fees for PCS Licenses Purchased in Auction No. 22, *Memorandum Opinion and Order*, 16 FCC Rcd 10030, 10034, ¶ 12 (2001) (“*Entertainment Unlimited Memorandum Opinion and Order*”) (“The Commission does not involve itself in the private arrangements that may exist between “Payers” and bidders in returning excess funds on deposit, nor is it under any obligation to conduct investigations or make inquiries concerning the relationship between such parties where the “Payer” is clearly identified on the Form 159.”).

<sup>14</sup> *Id*; see also Hill & Welch and Myers Keller Communications Law Group Request for Attorney Fees in Connection with 218-219 MHz Service Proceeding and Regional Narrowband PCS Service, *Order*, 15 FCC Rcd. 20432, 20437, ¶ 10 (WTB 2000)(declining a request to create a common fund out of refunds generated by retroactive bidding credit), *affirmed*, *Order on Reconsideration*, 16 FCC Rcd. 9485 (WTB 2001), *affirmed*, *Memorandum Opinion and Order*, FCC 03-70, (rel. April 1, 2003).

<sup>15</sup> See 31 U.S.C. § 3727, 41 U.S.C. § 15 (known as the Anti-Assignment Acts, these statutes with limited exceptions operate to invalidate transfers of claims against the United States thereby providing that the Government would only have to deal exclusively with the original claimant and would always be aware of its obligations); *Patterson v. United States*, 354 F. 2d 327, 331 (Ct. Cl. 1965) (“The purposes generally imputed to Congress in enacting the anti-assignment statutes [are] . . . preventing fraud and immunizing the United States from the inconvenience and uncertainty of having to deal with several parties”).

<sup>16</sup> To obtain a waiver of the Commission's rules and procedures, Charleston must show (i) that the underlying purpose of the rule would not be served, or would be frustrated, by 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 this particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that Charleston has no reasonable alternative. 47 C.F.R. § 1.925.

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here. Thus, to grant Charleston's request would invite multiple liability because nothing would preclude the payor of record from subsequently applying for the same refund.<sup>17</sup> Accordingly, Charleston's waiver request is denied.

Conclusion

Accordingly, IT IS ORDERED that, Charleston's request for a waiver, dated February 12, 2002, is DENIED.

IT IS FURTHER ORDERED that this letter shall be sent to Charleston's representatives by certified mail, return receipt requested.

This action is taken pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), under authority delegated pursuant to Section 0.331 of the Commission's rules.<sup>18</sup>

Sincerely,

Margaret W. Wiener, Chief  
Auctions and Industry Analysis Division  
Wireless Telecommunications Bureau

cc: Perry D. West  
Interactive Technologies Corp.  
215 Riverside Drive  
Cocoa, FL 32922

Perry D. West  
Interactive Technologies Corp.  
P.O. Box 1656  
Cocoa, FL 32923

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<sup>17</sup> See *Patterson*, 354 F. 2d at 331 (stating that one of the Congressional purposes of the Anti-Assignment statutes is to advance the "policy of preventing multiple litigation and piecemeal adjudication.").

<sup>18</sup> 47 C.F.R. § 0.331.