



Federal Communications Commission  
Washington, D.C. 20554

October 16, 2003

DA 03-3263

**Via Certified Mail, Return Receipt Requested**

Mr. Raymond Quianzon  
Fletcher, Heald & Hildreth  
11<sup>th</sup> Floor  
1300 North 17<sup>th</sup> Street  
Arlington, Virginia 22209-3801

Re: TPS Utilicom, Inc.

Dear Mr. Quianzon:

This letter responds to your correspondence on behalf of TPS Utilicom, Inc. ("TPS") requesting that the Federal Communications Commission refund amounts that TPS has on deposit with the Commission.<sup>1</sup> As you know, TPS defaulted on four winning bids totaling a net \$13,817,000 in Auction No. 35.<sup>2</sup> Although the full amount of TPS's resulting default payment obligations cannot yet be determined, the Commission has assessed TPS an initial default payment of \$414,510.<sup>3</sup> TPS previously deposited \$1,036,000 with the Commission in order to participate in Auction No. 35.<sup>4</sup> TPS requests a refund of \$621,490.<sup>5</sup> For reasons discussed below, we deny the request.

At the close of Auction No. 35, TPS held net winning bids totaling \$13,817,000 for four broadband PCS C block licenses. Pursuant to its competitive bidding rules, the Commission required TPS to deposit twenty percent of its net winning bids, or \$2,763,400, following the close of the auction.<sup>6</sup>

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<sup>1</sup> Letter dated February 21, 2003, Raymond J. Quianzon, Counsel to TPS Utilicom, Inc. to To Whom It May Concern, Office of the Managing Director ("TPS Refund Letter").

<sup>2</sup> TPS Utilicom, Inc. Request for Waiver of Sections 1.2109 and 1.2107 of the Commission's Rules Regarding BTA043, BTA127, BTA215, and BTA330, DA 01-1833, *Order*, 16 FCC Rcd 14,835, 14,836 (WTB 2001) ("*Order*").

<sup>3</sup> *Order*, 16 FCC Rcd at 14,842.

<sup>4</sup> *Order*, 16 FCC Rcd at 14,836.

<sup>5</sup> TPS Refund Letter at 1-2.

<sup>6</sup> *Order*, 16 FCC Rcd at 14,835-6.

Notwithstanding its obligation, TPS did not make any post-auction payments to the Commission. Instead, TPS requested that its \$1,036,000 pre-auction upfront payment be applied toward its down payment obligations and requested a waiver of the remainder of its down payment obligation, which totaled \$1,727,400.<sup>7</sup> The Wireless Telecommunications Bureau (“Bureau”) denied TPS’s request for waiver in a July 31, 2001 *Order*.<sup>8</sup> As a result of TPS’s failure to pay the required down payment, it defaulted on its four winning bids.

As explained in the *Order*, TPS’s default subjected it to the Commission’s default payment rules.<sup>9</sup> Our rules governing bidder defaults are intended to maintain the integrity of the auction process by discouraging defaults on the part of bidders, encouraging bidders to make secondary or back-up financial arrangements, and ensuring that default payments are made in a timely manner.<sup>10</sup> The default payment rules help to ensure that licenses end up in the hands of those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service.<sup>11</sup>

Specifically, those rules require TPS to make a payment equal to the difference between the amount of its bids and the amount of subsequent winning bids at a re-auction of the spectrum associated with the licenses on which TPS defaulted.<sup>12</sup> TPS also is liable for an additional payment equal to three percent of each defaulted bid or subsequent winning bid, whichever is less.<sup>13</sup> Consequently, TPS will owe the Commission at least three percent of its defaulted net bids and may owe much more.<sup>14</sup> As further explained in the *Order*, because the Commission could not fully determine the amount of TPS’s

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<sup>7</sup> *Order*, 16 FCC Rcd at 14,836-7.

<sup>8</sup> *Order*, 16 FCC Rcd 14,835.

<sup>9</sup> *Order* 16 FCC Rcd at 14,842.

<sup>10</sup> Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order*, 13 FCC Rcd 374, 433-34 (1998) (“*Part 1 Third Report and Order*”).

<sup>11</sup> *Id.*

<sup>12</sup> 47 C.F.R. § 1.2104(g)(2) (incorporating § 1.2104(g)(1)).

<sup>13</sup> 47 C.F.R. § 1.2104(g)(2).

<sup>14</sup> At an absolute minimum, TPS will owe three percent of its aggregate net defaulted bids as a default payment. If a subsequent winning bid is greater than the defaulted bid, the default payment will be three percent of the defaulted bid. If a subsequent winning bid is less than the defaulted bid, the default payment will always be greater than three percent of the defaulted bid. In that case, the default payment is the defaulted bid minus the lesser subsequent winning bid plus three percent of the lesser subsequent winning bid, or, in other words, the defaulted bid minus ninety-seven percent of the lesser subsequent winning bid. The defaulted bid minus ninety-seven percent of the lesser subsequent winning bid always will be greater than the defaulted bid minus ninety-seven percent of the defaulted bid or, in other words, always will be greater than three percent of the defaulted bid.

default payment prior to a re-auction of the relevant spectrum, the Commission assessed an initial default deposit of \$414,510, or three percent of the total amount of TPS's net defaulted bids, toward the default payment.<sup>15</sup>

TPS sought reconsideration of its waiver request, which the Commission denied in a February 21, 2003 *Order on Reconsideration*.<sup>16</sup> Following the denial of TPS's petition for reconsideration of its waiver request, TPS asked that the Commission refund amounts on deposit with the Commission in excess of the initial default payment.<sup>17</sup>

The Commission retains deposits of defaulting bidders for a simple reason: "We will hold deposits made by defaulting or disqualified auction winners to help ensure that the penalty is paid."<sup>18</sup> However, the Commission has recognized that it may not be equitable in all circumstances to retain the total amount on deposit.<sup>19</sup> Accordingly, the Commission generally requires "an initial default deposit of between three percent (3%) and twenty percent (20%) of the defaulted bid amount where a winning bidder or licensee defaults and the defaulted license has yet to be reauctioned."<sup>20</sup>

The Commission frequently has retained more than a three percent payment, withholding amounts that the defaulter has on deposit in excess of three percent of the defaulted bid.<sup>21</sup> A three percent payment is the minimum amount that the defaulting bidder ultimately will be obligated to pay, and therefore the Commission will not refund

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<sup>15</sup> *Order*, 16 FCC Rcd at 14,842.

<sup>16</sup> TPS Utilicom, Inc. Request for Waiver of Sections 1.2109 and 1.2107 of the Commission's Rules Regarding BTA043, BTA127, BTA215, and BTA330, DA 03-480, *Order on Reconsideration*, 18 FCC Rcd 2516 (2003).

<sup>17</sup> TPS Refund Letter.

<sup>18</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2383 (1994) ("*Competitive Bidding Second Report and Order*").

<sup>19</sup> See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5564, n. 53 ("*Competitive Bidding Fifth Report and Order*").

<sup>20</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 434.

<sup>21</sup> See Letter to John A. Prendergast, Esq., DA 99-690, 14 FCC Rcd 6323, 6326-27 (1999) ("*New Wave Letter P*") (following deduction of the "\$18,068 initial default payment" and other payments due, "the Commission will retain the remainder of New Wave's deposit (\$31,182) pending assessment of the full default payment at the close of the auction"); Letter to Stephen Kaffee, Esq., DA 99-520, 14 FCC Rcd 4026, 4029-30 (1999) ("*EU Letter*") (following deduction of "three percent of EU, Inc.'s net bid on the [defaulted] license" and other payments due, the Commission will "retain the remainder [over \$100,000] of EU, Inc.'s deposit pending our assessment of its full default payment"); Longstreet Communications International, Inc., Market B012C Altoona, PA, DA 00467, *Order*, 15 FCC Rcd 8562, 8564 (2000) ("*Longstreet Order*") ("Longstreet Communications International, Inc.'s remaining balance of \$155,295.00 shall be held on deposit until a new bid price for the defaulted license is established.").

this amount to the defaulter under any circumstances.<sup>22</sup> In contrast, retained deposits may or may not be refunded because they may be applied against the final default payment which cannot be calculated until after auction of licenses associated with the relevant spectrum.

As noted in your letter, the Commission on occasion has refunded deposits in excess of an assessed three percent interim payment.<sup>23</sup> The two refunds TPS cites, however, involve circumstances easily distinguished from the current ones. In the first, the Commission refunded excess deposits to Progeny LMS, LLC.<sup>24</sup> Unlike TPS, Progeny did not fail to pay its initial post-auction down payments. Instead, Progeny defaulted on two licenses because it was the winning bidder on more licenses than it was permitted to hold in the relevant markets.<sup>25</sup> In fact, Progeny paid its post-auction obligations on more than 200 licenses and was disqualified from holding only two.<sup>26</sup> These circumstances clearly distinguish Progeny from TPS, which made no post-auction payments at all. In addition, Progeny's two defaulted net bids totaled \$8,710, several orders of magnitude less than TPS's \$13,817,000 in defaulted net bids.<sup>27</sup> Consequently, the Commission must give greater consideration to actively ensuring that the final default payment is paid in TPS's case than it did in Progeny's.

In the second refund TPS cites, in 1999, the Commission refunded excess deposits to Grand Connectivity, LLC.<sup>28</sup> After Grand Connectivity defaulted on net bids totaling \$2,674,650, or roughly one-fifth of TPS's defaulted net bids, the Commission granted Grand Connectivity's request for a refund of slightly less than \$70,000, or roughly one-ninth of TPS's request.<sup>29</sup> As the Commission's frequent retention of excess deposits demonstrates, the simple fact that it granted a refund to Grand Connectivity does not compel it to refund TPS's excess deposits. Moreover, it is not clear that the Commission would exercise its discretion to grant a refund to Grand Connectivity if presented with the same facts today. After the Commission issued the refund to Grand Connectivity, the

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<sup>22</sup> *Longstreet Order*, 15 FCC Rcd at 8563 (“A three-percent payment is the minimum amount that Longstreet could owe on the license for Market B012C. Accordingly, by this Order, we assess an initial default payment of \$66,555.00, three percent of Longstreet's winning bid for the Market B012C.”)

<sup>23</sup> TPS Refund Letter at 1-2.

<sup>24</sup> Letter to Erica DeSilva, DA 99-1731, 14 FCC Rcd 13,954, 13,957 (1999) (“*Progeny Letter*”).

<sup>25</sup> *Progeny Letter*, 14 FCC Rcd at 13,954.

<sup>26</sup> *Id.*

<sup>27</sup> *Progeny Letter*, 14 FCC Rcd at 13,958.

<sup>28</sup> Request for Waiver of Section 1.2104(g) of the Commission's Rules filed by Grand Connectivity L.L.C., DA 99-1726, *Order*, 14 FCC Rcd 13,943, 13,949 (1999) (“*Grand Connectivity Order*”) (“any remaining amount after the three percent default payment is assessed will be refunded to Grand Connectivity”).

<sup>29</sup> *Grand Connectivity Order*, 14 FCC Rcd at 13,950.

Departments of Justice and Treasury amended the Federal Claims Collection Standards (“FCCS”).<sup>30</sup> Last year, the Commission issued a Notice of Proposed Rulemaking to enhance the Commission’s ability to “aggressively collect all debts” pursuant to the revised FCCS.<sup>31</sup> In light of its ongoing efforts to enhance debt collection, the Commission today might exercise its discretion to retain Grand Connectivity’s excess deposit to help ensure that the final amount due is paid. Given that intervening developments would make it incorrect to repeat by rote the analysis in Grand Connectivity’s case, the Commission clearly is not be compelled to repeat its prior decision to grant a refund in these different circumstances.<sup>32</sup>

In this instance, we believe that the public interest will be served best by retaining TPS’s deposit pending determination of the final default payment. TPS’s total amount on deposit, \$1,036,000 before deducting the minimum three percent default payment, is substantially less than twenty percent, or even ten percent, of its \$13,817,000 defaulted net bids. Given the amount of the defaulted bids at issue and the absence of any known funds to satisfy any additional final default payment, prudence counsels that the Commission retain the amounts on deposit. Finally, we note that the deposit only will be retained until the Commission conducts an auction that determines the final default payment.<sup>33</sup> Taking into account all the statutory objectives of competitive bidding, such as promoting efficient and intensive use of electromagnetic spectrum,<sup>34</sup> we currently expect to announce an auction of this spectrum in the near future.

This action is taken pursuant to authority delegated by Section 0.331 of the Commission’s rules.<sup>35</sup>

Sincerely,

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

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<sup>30</sup> Amendment of Part 1 of the Commission’s Rules; Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors, MD Docket No. 02-339, 17 FCC Rcd 23,096, 23,096 (2002) (“*DCIA NPRM*”).

<sup>31</sup> *DCIA NPRM*, 17 FCC Rcd at 23101-102.

<sup>32</sup> *Cf. Southeast Telephone, Inc. v. Federal Communications Commission*, 1999 WL 1215855 (D.C. Cir. 1999) (unpublished decision).

<sup>33</sup> *See, e.g.,* Letter to Joseph P. Gebhardt and John A. Prendergast, Esq., DA 02-1554, 17 FCC Rcd 16,047 (2002) (“*New Wave Letter IP*”) (following reauction, the Commission determined that New Wave did not owe any additional default payments and released the excess deposits retained pursuant to *New Wave Letter I* for refund).

<sup>34</sup> 47 U.S.C. § 309(j)(3)(D).

<sup>35</sup> 47 C.F.R. § 0.331.