

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

In the Matter of)
)
TPS UTILICOM, INC.)
)
Request for Waiver of Sections 1.2109 and 1.2107)
of the Commission's Rules Regarding BTA043,)
BTA127, BTA215, and BTA330)
)
Petition for Reconsideration)

ORDER ON RECONSIDERATION

Adopted: February 21, 2003

Released: February 21, 2003

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. TPS Utilicom, Inc. ("TPS") seeks reconsideration¹ of an Order² issued by the Wireless Telecommunications Bureau, Commercial Wireless Division ("Division"). In the *Order*, the Division denied TPS's request for a waiver of Commission rules governing TPS's post-auction down payment, dismissed TPS's FCC Form 601 ("long-form application") for the relevant licenses, assessed an initial default payment against TPS, and set forth further default payment obligations and procedures for TPS. For reasons set forth below, we deny TPS's Reconsideration Petition.

II. BACKGROUND

2. At the close of the Broadband Personal Communications Service ("PCS") C and F block auction ("Auction No. 35") on January 26, 2001, TPS was the high bidder for four C block licenses.³ In Auction No. 35, available licenses could be won in either closed or open bidding.⁴ TPS was the winning

¹ TPS Utilicom, Inc., Request for Waiver of Sections 1.2109 and 1.2107 of the Commission's Rules Regarding BTA043, BTA127, BTA215 and BTA330, Petition for Reconsideration (filed August 30, 2001) ("Reconsideration Petition").

² TPS Utilicom, Inc., Request for Waiver of Sections 1.2109 and 1.2107 of the Commission's Rules Regarding BTA043, BTA127, BTA215, and BTA330, *Order*, 16 FCC Rcd 14,835 (CWD 2001) ("*Order*").

³ TPS was the high bidder for the following basic trading area licenses: BTA 043 (frequency block C1); BTA 127 (C1); BTA 215 (C3); and BTA 330 (C3). C and F Block Broadband PCS Auction Closes, DA 01-211, *Public Notice*, 16 FCC Rcd 2339 (2001) ("*Closing Public Notice*").

⁴ In the *C/F Block Sixth Report and Order*, the Commission removed eligibility restrictions on certain C block licenses, thereby establishing "open" bidding on these licenses. Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket (continued....)

bidder for two licenses in closed bidding and two licenses in open bidding.⁵

3. As noted in the *Closing Public Notice*, all Auction No. 35 winning bidders were obligated to file long-form applications for licenses by February 12, 2001.⁶ Additionally, as also noted in the *Closing Public Notice*, pursuant to section 1.2107(b) of the Commission's rules, each winning bidder also was required to make any payments necessary to bring its total deposits up to twenty percent of its winning bids ("down payment") within ten business days after being notified that it is a winning bidder, *i.e.*, by February 12, 2001.⁷

4. TPS timely filed two long-form applications for its four C block licenses, with each application covering two of the licenses.⁸ TPS, however, failed to fulfill its post-auction down payment obligation. Instead, TPS requested that its upfront payment be deemed to satisfy its down payment obligation on the two licenses won in open bidding in full and to make a "good faith" partial down payment on the two licenses won in closed bidding.⁹ Subsequently, TPS asked that the Commission waive its rules to the extent necessary to grant TPS's request and that the Commission continue

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No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16,266 (2000) ("*C/F Block Sixth Report and Order*"). Generally, only qualified bidders who met certain small business or entrepreneur criteria could participate in closed bidding. *Id.* All qualified bidders, regardless of attributable assets or revenues, were eligible to participate in open bidding. *Id.*

⁵ License Nos. BTA 043 (C1) and BTA 127 (C1) were available only in closed bidding and license Nos. BTA 215 (C3) and BTA 330 (C3) were available in open bidding. C and F Block Broadband PCS Spectrum Auction Scheduled for December 12, 2000, DA 00-2259, *Public Notice*, 15 FCC Rcd 19,485, 19,489-90 (2000) ("*Procedures Public Notice*").

⁶ *Closing Public Notice*, 16 FCC Rcd at 2343.

⁷ *Closing Public Notice*, 16 FCC Rcd at 2340; *see* 47 C.F.R. § 1.2107(b). In compliance with section 1.2106(a) of the Commission's rules, TPS made a pre-auction upfront payment of \$1,036,000. In Auction No. 35, as in most auctions, a participant's upfront payment determined the participant's eligibility to bid during the auction. *See Procedures Public Notice*, 15 FCC Rcd at 19,511 ("The amount of the upfront payment submitted by a bidder determines the initial maximum eligibility ([measured] in bidding units) for each bidder. . . . The total upfront payment defines the maximum number of bidding units on which the applicant will be permitted to bid." A bidder with bidding units equal to or greater than any given license's fixed bidding unit value may place a bid on such license in any amount, consistent with auction procedures.) After the close of the auction, the Commission credits a bidder's upfront payments against any bid withdrawal or default penalties incurred and then applies a winning bidder's remaining upfront payment toward the winning bidder's down payment obligations. 47 C.F.R. § 1.2106(d) and (e). Based on its winning bids, TPS owed a total down payment of \$2,763,400. *Closing Public Notice*, 16 FCC Rcd at 2370. Attachment B to the *Closing Public Notice* advised winning bidders of the exact amounts of payments due on their accounts after application of the upfront payment. After TPS's upfront payment was applied toward its down payment of \$2,763,400, the remaining balance owed to the Commission was \$1,727,400. *Id.*

⁸ TPS filed one long-form application for the two licenses won in closed bidding, Universal Licensing System ("ULS") File No. 0000365277, and a second for the two licenses won in open bidding, ULS File No. 0000365279.

⁹ Petition of TPS Utilicom, Inc., for a Waiver of Sections 1.2107 and 1.2109 of the Commission's Rules, filed February 23, 2001, at 1 ("TPS Waiver Request").

processing TPS's long-form applications for all four licenses.¹⁰

5. In its Waiver Request, TPS asserted that it should not have to pay the full down payment based on its high bids. TPS alleged that the participation of unqualified bidders in closed bidding "may have skewed auction results and created artificially inflated bid amounts."¹¹ TPS asserted that it should not be required to pay "excess down payment amounts" based on the undisputed amounts of its high bids "until the closed market bid amounts can be determined to be correct[.]"¹² According to TPS, making it pay the full down payment required by the Commission's rules would not serve the rules' underlying purpose, which TPS identified as being "in part, . . . to discourage insincere bidding during auctions."¹³ TPS asserted that it had demonstrated its sincerity by designating its upfront payment on deposit with the Commission as "good faith funds" to satisfy, in part, its down payment obligation.¹⁴ TPS further contended that its plans to use the licenses to provide Native Americans with wireless services created a public interest in preserving its eligibility for the licenses.¹⁵ Finally, TPS indicated that it sought the waiver, to the extent necessary, during the pendency of challenges to other bidders' qualifications that TPS anticipated would be filed and would raise "new and novel" issues.¹⁶

6. The Division denied TPS's request and declined to waive Commission rules, relying upon the well-established policy that the Commission "does not waive the first down payment deadline because its strict enforcement is essential to protect the integrity of the auctions process by preventing insincere bidding and to determine the financial qualification of a new licensee to provide communications services."¹⁷ The Division noted that TPS's sincerity in complying with some Commission rules did not excuse its failure to comply with others.¹⁸ Similarly, the Division held that TPS's intent to provide service to Native Americans neither excused TPS's failure to comply with the Commission's rules nor outweighed the public interest in consistent enforcement of those rules.¹⁹ Finally,

¹⁰ *Id.*

¹¹ *Id.* at 2-3, 6.

¹² *Id.* at 5.

¹³ *Id.* at 3.

¹⁴ *Id.* at 3-4.

¹⁵ *Id.* at 4-5.

¹⁶ *Id.* at 6. Although TPS premised its Waiver Request on the existence of challenges to the qualifications of other bidders, its Waiver Request did not identify any such challenges and merely asserted "[u]pon information and belief" that Auction No. 35's post-auction proceedings would involve such challenges. *Id.* at 2.

¹⁷ *Order* at 14,838, ¶8 (citing BDPCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 15,341 (1997) ("*BDPCS I*"); Application of Phoenix Data Communications, Inc., DA 99-2667, *Order on Reconsideration*, 14 FCC Rcd 21,122 (1999) ("*Phoenix Data Order*"), *aff'ing in part* Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, DA 94-1126, *Order*, 9 FCC Rcd 6384 (1994) ("*IVDS Waiver Request*"); National Telecom PCS, Inc., *Order on Reconsideration of Memorandum Opinion and Order*, 14 FCC Rcd 18,822 (1999) ("*National Telecom Reconsideration Order*"), *aff'd* *National Telecom PCS, Inc. v. Federal Communications Commission*, 254 F.3d 316 (D.C. Cir. 2000)(unpublished opinion available at 2000 WL 1584572); *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999)).

¹⁸ *Id.* at 14,840, ¶12.

¹⁹ *Id.*

in response to TPS's assertion that post-auction challenges to other bidders' qualifications would present new and novel issues, the Division pointed out that the affiliation rule used to determine eligibility to participate in closed bidding had been applied in prior auctions.²⁰ More importantly, the Division also noted that if TPS sought to challenge the closed bidding rules or application of the eligibility rules to other particular bidders, the appropriate forums for such challenges would be, respectively, the rulemaking adopting the rules or a petition to deny the particular high bidder's long-form application for the license.²¹ Thus, the Division concluded that none of the arguments presented by TPS merited relieving TPS of its obligation to make the full down payment on its winning bids pursuant to the Commission's rules.

7. Accordingly, the Division held that TPS's failure to pay its full down payment constituted TPS's default on all four licenses.²² Consequently, the Division also assessed an initial default payment against TPS, noted that TPS would be subject to further default payments after the Commission auctioned the spectrum associated with the licenses, and dismissed TPS's two long-form applications for the four licenses.²³ On August 30, 2001, TPS filed its Reconsideration Petition.²⁴

III. DISCUSSION

8. In its Reconsideration Petition, TPS alleges that the Division's *Order* contained four errors of law and fact. First, TPS contends that its down payment is not a single obligation governing all four licenses but rather is a license-by-license obligation. TPS asserts that Commission precedent allows TPS to make full down payments on high bids for the two licenses won in open bidding while contesting its obligations with respect to the two licenses won in closed bidding.²⁵ Second, TPS claims that the public interest will be served by allocating its pre-auction upfront payment to cover solely the down payment based on its two high bids in open bidding and granting it those licenses.²⁶ Third, with respect to

²⁰ *Id.* at 14,841-2, ¶15 (noting that the affiliation rule, known as the controlling interest standard, had been previously applied in Auction Nos. 33 (700 MHz Guard Bands) and 36 (800 MHz SMR Service Lower 80 Channels)).

²¹ *Id.* at 14,841, ¶14 (noting that TPS had the opportunity to seek reconsideration of the *C/F Block Sixth Report and Order*.)

²² *Id.* at 14,842, ¶16.

²³ *Id.* at 14,835, ¶1.

²⁴ *Id.* Four months after filing the Reconsideration Petition, TPS submitted a letter arguing that a subsequent decision by the United States Court of Appeals for the District of Columbia Circuit merits consideration in connection with the Reconsideration Petition. Letter from Raymond J. Quiazon, Esq. to Paul D'Ari, Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, dated January 15, 2002 (citing *High Plains Wireless, L.P. v. FCC*, Docket No. 00-1292 (D.C. Cir. Jan. 11, 2002), with regard to "the long standing Commission policy of ensuring due process"). Commission rules require parties supplementing a petition for reconsideration more than 30 days after the underlying action to file a separate pleading seeking leave to file the supplement. 47 C.F.R. § 1.106(f). TPS did not file any such separate pleading. Accordingly, to the extent TPS sought to introduce a new argument through this letter, such a request is denied. We note, however, that the decision cited by TPS simply affirmed a prior Commission decision that applied well established legal concepts and did not establish any new legal principles. In any event, the Commission always considers relevant precedent.

²⁵ Reconsideration Petition at 4-8.

²⁶ *Id.* at 8-12.

the two licenses TPS won in closed bidding, TPS contends that the Division erred by disposing of TPS's Waiver Request while new and novel questions regarding whether unqualified bidders participated in closed bidding were pending in other proceedings.²⁷ TPS argues that the denial of its Waiver Request prejudged new and novel questions that only the Commission – not the Division – may resolve.²⁸ Fourth, TPS asserts that, pursuant to the Communications Act, the Commission's retention of TPS's pre-auction upfront payments entitles TPS to have its long-form applications processed regardless of its failure to pay the full amount of the down payment based on all four high bids.²⁹ Each of these arguments fails for reasons discussed below.

A. The Winning Bidder Must Submit a Full First Down Payment

9. TPS argues that the Division erred by concluding that TPS defaulted on all four of its licenses.³⁰ TPS contends that its two long-form applications, one for the two licenses won in open bidding and one for the two licenses won in closed bidding, should have been processed independently of one another and that its upfront payment satisfied its down payment obligation with respect to the two licenses won in open bidding. We find, however, that the Division correctly applied the applicable rules and precedents when dismissing both applications together based on TPS's failure to pay its full down payment. In numerous decisions predating Auction No. 35, the Commission, or its delegated authority, has denied every request by bidders to waive any aspect of the first post-auction down payment obligation.³¹ TPS offers no persuasive reason to depart from the Commission's rules and established precedent.

²⁷ *Id.* at 13-16. In the Reconsideration Petition, TPS refers to two petitions to deny filed in connection with Auction No. 35 but does not identify the petitions or explain how they specifically relate to TPS's high bids or the licenses at issue. *See id.* at n. 29.

²⁸ *Id.* at 13-16.

²⁹ *Id.* at 16-17.

³⁰ Reconsideration Petition at 5.

³¹ *See National Telecom Reconsideration Order*, 14 FCC Rcd 18,822; Requests for Waivers in the First Auction of Interactive Video and Data Service (IVDS) Licenses, 11 FCC Rcd 8211 (1996), *aff'd Commercial Realty St. Pete, Inc. et al. v. Federal Communications Commission*, 116 F.3d 941 (1997) (unpublished opinion available at 1997 WL 358223); BDPCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 3230, *aff'd in relevant part, BDPCS I; Phoenix Data Order*; Mountain SMR Group, L.L.C. For Authorization To Construct and Operate New Specialized Mobile Radio Service on the 800 MHz Band for License E-172A, the Honolulu, Hawaii A Block Market, DA 99-469, *Order*, 14 FCC Rcd 3823 (1999), *aff'ing* Letter to Mr. Jack Bond, DA 98-378, *Letter*, 13 FCC Rcd 4504 (1998); C.H. PCS, Inc., DA 96-1237 *Order*, 11 FCC Rcd 9343 (1996); C.H. PCS, Inc. Dismissal of Seven Broadband PCS C-Block Long-form applications for Auction Event No. 5, DA 99-1166, *Memorandum Opinion and Order*, 1999 WL 394978 (rel. June 16, 1999); *see also* BDPCS, Inc., BTA Nos. B008, B036, B055, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, B447, Frequency Block C, *Memorandum Opinion and Order*, 15 FCC Rcd 17,590 (2000) ("*BDPCS II*") (denying requests for waiver of default payments); 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 13943 (1999) (denying request for waiver of default payments). In another decision, the Commission also rejected a similar request by a high bidder to make partial payments. AirCom Communication Consultants, Inc., Request for Waiver of 47 C.F.R. § 1.2109(b), *Order*, 16 FCC Rcd 17,685 (2001) ("*AirCom*") (denying requests for selective default or waiver of first post-auction down payment deadline), *recon. denied, Order on Reconsideration*, DA 03-405 (rel. February 11, 2003).

10. The competitive bidding system established by the Commission was designed to serve a variety of statutory purposes, including the effective rapid deployment of new technologies and services to the public and the efficient and intensive use of spectrum.³² In designing the competitive bidding system, the Commission determined that winning bidders should be required to make a down payment shortly after the close of auction and that such payment should be based on the bidder's total high bid amount.³³ The Commission requires such a payment because, in light of the timing of the payment and the relationship between the payment and the winning bid, the payment demonstrates that the winning bidder is the party that values the license most highly, is capable of providing service, and has the intent and ability to pay its winning bid amounts.³⁴ Thus, the first post-auction payment serves a significant role in ensuring the integrity of the auction process, thereby ensuring that the Commission's statutory objectives are met.

11. In the Reconsideration Petition, TPS cites six decisions that it alleges condone partial payments of first post-auction down payments.³⁵ Contrary to TPS's assertion, Commission precedent has never allowed a bidder to pay an initial down payment for only select high bids and not others. In each decision TPS cites, and in contrast to TPS, the bidder made its first post-auction down payment in full and only sought to make partial payment of a later payment. Rather than support TPS, the cited decisions reflect the Commission's consistent distinction between defaults on the first post-auction down payment, due days after the auction's close, and defaults later in the auction process. These decisions, made in the context of partial default, do not change the fact that the Commission always has held that a bidder's inability or refusal to make the first post-auction down payment poses a more significant threat to the

³² See 47 U.S.C. § 309(j)(3)(A), (D).

³³ See 47 C.F.R. § 1.2107.

³⁴ *Order* at 14,839-40, ¶11; *BDPCS II*, 15 FCC Rcd at 17,599-600, ¶16; *Commercial Realty St. Pete, Inc., James C. Hartley, Teresa Hartley, and Ralph E. Howe, Memorandum Opinion and Order*, 15 FCC Rcd 7057, 7062-63, ¶15 (1999) ("*Commercial Realty St. Pete MO&O*"). In addition, the first post-auction down payment provides the Commission with funds (in addition to the upfront payment) from which to deduct future default payments. See *IVDS Waiver Request*, 9 FCC Rcd at 6384, ¶5.

³⁵ Reconsideration Petition at 6-7 (*citing* LMDS Communications, Inc. Request for Waiver of Sections 1.2109(a) and (c), 1.2104(g) and 101.1105(b) of the Commission's Rules regarding BTA117, BTA112, BTA203, BTA215, BTA218, BTA287, BTA317, BTA328, BTA330, BTA335, BTA375 and BTA416, DA 00-556, *Order*, 15 FCC 8618 (2000) (denying winning bidder's request for an extension of deadline and calculating payments due based upon its selective default); Eric W. DeSilva, Esq., DA 99-1731, *Letter*, 14 FCC Rcd 13,954 (1999) (discussing applicant's disqualification pursuant to service rules for two licenses for which applicant held high bids and had made first down payment; calculating payments due for default); John A. Prendergast, Esq., DA 99-690, *Letter*, 14 FCC Rcd 6323 (1999) (calculating default payments due based upon selective default); Stephen Kaffee, Esq., DA 99-520, *Letter*, 14 FCC Rcd 4026 (1999) (same); Wireless Telecommunications, Inc. BTA No. B179 Multipoint Distribution Service, DA 97-1101, *Order*, 12 FCC Rcd 6751 (1997) (same); Tel-Com Wireless Cable TV Corporation, BTA No. B189 Multipoint Distribution Service, DA 97-1100, *Order*, 12 FCC Rcd 6747 (1997) (same)). Furthermore, as discussed in an instance of selective default that TPS does not cite, and as reflected in several decisions that it does, selective defaulters remain subject to the Commission's default payment rules. *E.g.*, Application of Baker Creek Communications, L.P. for Authority to Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas, DA 99-1037, *Order*, 14 FCC Rcd 11,529, 11,532 (1999) (calculating final default payment after sale of licenses associated with same spectrum as defaulted licenses). Thus, high bidders defaulting selectively after the first post-auction down payment still face serious consequences from their failure to fulfill their high bids.

integrity of auction process than a later default.³⁶

B. The Public Interest is Served by Enforcement of the Rules

12. TPS believes that the Division should have found that the public interest in deploying service in underserved markets supported granting TPS's request with respect to the two licenses won in open bidding. In the Reconsideration Petition, TPS argues that the need for telecommunication service in markets covered by those licenses, particularly on Western New York State Indian Reservations, creates a unique public interest in granting TPS those licenses.³⁷ However, as correctly noted in the *Order*, TPS's asserted intent to provide service to Native Americans does not excuse TPS from complying with the Commission's competitive bidding rules.³⁸ The Commission repeatedly has rejected arguments that statutory mandates or Commission policies entitling certain entities to special competitive bidding provisions, such as bidding credits, closed bidding, or tribal land bidding credits, also entitle those entities to special treatment under general competitive bidding rules.³⁹ In fact, the Commission fulfills

³⁶ The Commission has taken notice of the fact that during the time between the first post-auction payment and later ones, unforeseeable events may take place that prevent the winning bidder from fulfilling all of its payment obligations. *See, e.g.*, LMDS Communications, Inc., DA 00-556, *Order*, 15 FCC Rcd 8618 (Auction No. 23 closed May 12, 1999, applicant paid full first down payment on May 26, 1999, and investor subsequently withdrew during three months leading up to September 7, 1999, final date for late payment on second down/full payment). In this case, in contrast, TPS failed to make its full first down payment, but seeks to obtain all of the licenses it won.

³⁷ Reconsideration Petition at 8-12.

³⁸ *Order* at 14,840, ¶12. In its Reconsideration Petition, TPS provides additional information to buttress the argument in its original Waiver Request that the public interest would be served by enabling it to obtain licenses because it intends to provide service to Native Americans. Specifically, TPS describes in greater detail the need for wireless service in Western New York State Indian Reservations. Reconsideration Petition at 8-12. As discussed above, the additional information TPS provides regarding that need does not contradict the Division's original conclusion that TPS's intent to serve those areas does neither excuse "its failure to comply with the Commission's down payment deadlines nor outweighs the public interest benefit in even-handed enforcement of the Commission's rules. . . . Maintaining the integrity of the auctions process benefits all applicants, including those that intend to serve, or are otherwise connected with, Native Americans." *Order* at 14,840-41, ¶12; cf. Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 11,794, 11,805, ¶31 and 11,808, ¶39 (2000) (noting that tribal land bidding credits do not affect down payment obligations while encouraging requests for waivers of operational and licensing rules in order to facilitate service to tribal lands).

³⁹ *See, e.g.*, *AirCom* 16 FCC Rcd 17,685 (denying requests for selective default so that bidder could offer service to tribal lands); *BDPCS II*, 15 FCC Rcd 17,590 at 17,594, ¶4 and n.27 (affirming Bureau conclusion that general support for small businesses did not constitute "facts that warranted a deviation from the general rule"); Mountain Solutions Ltd., Inc. Emergency Petition for Waiver of Section 24.711(A)(2) of the Commission's Rules Regarding Various BTA Markets in the Broadband Personal Communications Services (PCS) C Block Auction, *Memorandum Opinion and Order*, 13 FCC Rcd 21,983, 21,994, ¶20 (1998) ("Neither [the Commission's] mandate to provide opportunities for small businesses nor its finding that small businesses have difficulty obtaining capital requires the Commission to waive payment deadlines for small businesses in this instance."); Styles Interactive, Inc. Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline, *Memorandum Opinion and Order*, 12 FCC Rcd 17,987, 17,991-92, ¶7 (1997) ("The Commission has fulfilled its mandate and acted consistently with its own findings by making bidding credits and installment payment plans available to small businesses participating in the IVDS auction. Neither its mandate to provide opportunities nor its finding that small businesses have difficulty obtaining capital requires the Commission to waive payment deadlines for small businesses.")

competitive bidding statutory mandates and policy goals with appropriate rule provisions; not by forbearing from enforcing its competitive bidding rules. Moreover, the public interest in general service deployment does not support granting TPS's request. The broad purpose of Section 309(j) was to create an efficient regulatory regime based on the congressional determination that competitive bidding is the most effective way of allocating resources to their most productive uses.⁴⁰ Thus, the Commission has recognized that "[a]uction designs that award licenses to the parties that value them most highly will best achieve" the goals set forth by Congress.⁴¹ Accordingly, the Commission designed the competitive bidding rules to ensure that the ultimate purpose of the auction, which is to encourage and facilitate the provision of reliable service to the public, is not undermined by winning bidders that lack the financial capability to pay for the license, construct systems, and provide service to the public.⁴² Thus, grant of TPS's request here would undermine the ultimate purpose of the Commission's payment rules and would be contrary to the public interest.⁴³

13. Grant of TPS's request would undermine enforcement of the rules that protect against strategic bidding or gaming of the auction system. The Commission's withdrawal and default rules enable, and encourage, bidders to withdraw unfinanced high bids during the course of the auction, rather than to default after close of auction.⁴⁴ The auction rules do so in part to increase the likelihood that winning bidders at the close of the auction will have both the requisite financing and intent to use licenses to deploy service rapidly.⁴⁵ Similarly, such rules discourage post-auction "shopping" of the licenses by bidders who lack the requisite financing.⁴⁶ Thus, grant of TPS's request would undermine the

⁴⁰ *BDPCS II*, 15 FCC Rcd 17,590 at 17,598, ¶14. As the House Committee on Energy and Commerce explained, "[a] carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves." H.R. Rep. No. 103-111, at 253 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580.

⁴¹ *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, 2360, ¶ 70 (1994) (quotation and citation omitted) ("*Competitive Bidding Second Report and Order*").

⁴² *Id.* at 2381; *see also* *Mountain Solutions*, 197 F.3d at 518 ("The Commission also could reasonably rely on strict enforcement of the deadlines to provide an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public.") (citations omitted).

⁴³ *See* Southern Communications Systems, Inc., *Second Memorandum Opinion and Order*, 16 FCC Rcd 18,357, 18,361, ¶9 (2001) ("[E]nforcing the Commission's payment rules . . . serves the public interest better than relying on the wholly unsubstantiated possibility that [petitioner] might have provided service in its license area sooner than the successor licensees will."); *see also* Licenses of 21st Century Telesis, Inc. For Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,126-27, ¶¶ 28-29 (2000) ("*21st Century Telesis MO&O*").

⁴⁴ *See* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-2, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,328, ¶ 72 (2000) ("Encouraging withdrawals over defaults increases auction efficiency. If a bidder withdraws its bid during an auction, there is an opportunity for another bidder to win the license.")

⁴⁵ *See id.*

⁴⁶ *See, e.g., Commercial Realty St. Pete MO&O*, 15 FCC Rcd at 7062-63, ¶15; *BDPCS I*, 12 FCC Rcd at 15,348-49, ¶12 ("We have said repeatedly that auction participants should be financially sound prior to (continued....)")

Commission's intent and increase the likelihood that the winning bidder will not be the party who can put the licenses to the highest use, but will be the party that is most optimistic regarding its chances of obtaining post-auction financing or post-auction relief similar to the relief requested by TPS.

14. Finally, any speculative public interest benefit from granting two of the licenses to TPS, in lieu of another licensee at a subsequent auction, does not negate the fact that granting the request overall would be contrary to the public interest. Granting TPS the two licenses it won in open bidding would sacrifice the public interest in rapid service deployment following auctions by enabling TPS to tie up licenses won in closed bidding in post-auction disputes. The public interest in deploying service, as well as in avoiding future post-auction defaults, is best served by upholding auction integrity and affirming auction results, not by granting TPS the waiver it requests. Insisting that winning bidders demonstrate their ability to pay shortly after close of the auction is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won licenses and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace.⁴⁷

C. The Division had Authority to Resolve TPS's Waiver Request

15. In its Reconsideration Petition, TPS argues incorrectly that the Division made an error of law by resolving TPS's original Waiver Request. TPS requested a waiver of the Commission's rules so that it could withhold a portion of its first post-auction payment. TPS asserts that unqualified bidders participated in closing bidding and, consequently, TPS inflated its bids on two licenses available in closed bidding in order to win them.⁴⁸ TPS asserts that challenges to those other bidders' qualifications to participate in closed bidding present new and novel questions that only the Commission, as opposed to the Division, can resolve. TPS argues that the Division's *Order* presupposed how the Commission would resolve those issues, and therefore, the Division exceeded its authority.

16. TPS's argument is misplaced because issues regarding whether other bidders were qualified to participate in closed bidding are completely irrelevant to TPS's down payment obligation. TPS argues, in effect, that it should be allowed to win licenses in closed bidding and subsequently dispute its down payment obligation by challenging the conditions under which the auction was conducted.⁴⁹ Such a result would contradict the competitive bidding system the Commission designed to further several Congressional objectives, including the rapid deployment of service "without administrative or judicial delays."⁵⁰ As stated above, the Division correctly noted that the time for TPS to challenge the Commission's decision to have closed bidding in Auction No. 35 was during the rulemaking proceeding. As we explain below, to the extent that TPS believed that certain bidders incorrectly certified that they were eligible for entrepreneur status, the time to challenge such certifications, absent substantiated evidence of wrongdoing, is after the auction is closed, in a petition to deny.

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participating in an auction. We reiterate that an entity should not continue to participate in an auction if its financing falls through during the auction.")

⁴⁷ See *21st Century Telesis MO&O*, 15 FCC Rcd at 25,124.

⁴⁸ Reconsideration Petition at 12.

⁴⁹ As the Division noted in the *Order*, notwithstanding TPS's assertion that Auction No. 35's new rules present novel issues, the principles underlying Auction No. 35's entrepreneur rules have been applied in prior auctions. See *Order*, 16 FCC Rcd at 14,841-2, ¶15.

⁵⁰ 47 U.S.C. §309(j)(3)(A).

17. The Commission adopted a two-phased approach to the review of auction applications and winning bidders' qualifications.⁵¹ In the first phase, the Wireless Telecommunications Bureau ("Bureau") reviews each filed FCC Form 175 ("short-form application") to ensure compliance with the Commission's rules.⁵² By submitting the short-form application, applicants declare, under penalty of perjury, that ". . . all matters and things stated in [the] application and attachments, including exhibits, are true and correct."⁵³ If the short-form application is found acceptable for filing, and the applicant submits the required upfront payments, other qualified bidders must assume that the applicant is qualified to bid and proceed accordingly.⁵⁴ Following close of the auction, winning bidders are required to submit a long-form application, and the second phase of the review commences.⁵⁵ If, either upon examination or through deficiencies brought to the Commission's attention through a petition to deny, the application is found to be defective or not in conformance with the Commission's rules, it will be denied or dismissed.⁵⁶ As a result, winning bidders may be disqualified after the auction is completed.⁵⁷ In adopting this two-phased approach, the Commission balanced the importance of limiting participation in its auctions to those entities that are legally, technically, and financially qualified to hold a Commission license with the need to conduct auctions expeditiously.⁵⁸

⁵¹ Implementation of Section 309(j) of the Communications Act — Competitive Bidding, MM Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2376, ¶ 163 (1994); Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum, DA 02-2631, *Order*, 17 FCC Rcd 19,746, 19,749-50 ¶ 7 (2002) ("*Telesaurus Order*") (explaining the two-phased review process in detail).

⁵² Mr. Steven R. Sixberry, DA 00-1949, *Letter*, 15 FCC Rcd 15,958 (2000) ("*Nevada Wireless Letter*") ("Absent substantiated evidence of wrongdoing, . . . it is more prudent to address [designated entity eligibility] allegations after the winning bidders have submitted their long-form applications"). In reviewing the short-form applications, the information and certifications contained in the short-form applications are presumed to be true unless they are incomplete, internally inconsistent, or contradicted by information in the Commission's records. *Id.*

⁵³ FCC Form 175.

⁵⁴ *Telesaurus Order*, 17 FCC Rcd at 19,450.

⁵⁵ *Id.*

⁵⁶ See, e.g., Application of Baker Creek Communications, L.P., 14 FCC Rcd 11,529 (1999) (petition to deny filed against the winning bidder and granted to the extent that the winning bidder was declared ineligible to receive the bidding credits claimed); Applications of Nextband Communications, L.L.C., 14 FCC Rcd 7647 (1999) (Commission concluding as a result of the petition to deny phase that a winning bidder did not violate the Commission's anti-collusion rules); see generally 47 C.F.R. §§ 1.934, 1.945, and 1.2018.

⁵⁷ In such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. 47 C.F.R. § 1.2109(c).

⁵⁸ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383, ¶¶ 200-201; Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, Reexamination of the Policy Statement on Comparative Broadcast Hearings, GC Docket No. 92-52, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, GEN Docket No. 90-264, *First Report and Order*, 13 FCC Rcd 15,920, 15,953, ¶ 90 (1998) ("We believe that the time and expense entailed in adjudicating fully all unresolved issues relating to the basic qualification issues as to all pending applicants would greatly exceed any additional delay that might result from the eventual disqualification of a winning bidder. For these reasons, we (continued....)

18. All auction applicants, including TPS, elect to participate in an auction with notice of the Commission's procedures, including the two-phased review explained above.⁵⁹ Thus, TPS should have known that the time to raise questions concerning bidder eligibility, absent substantiated evidence of wrongdoing, is in the post-auction long-form review phase. TPS, accordingly, was not free to "overbid," as it alleges it did, to hold onto the licenses in closed bidding in the hope that post-auction disqualification of other bidders would permit it to renegotiate its bids and payment obligations. Further, the consequences for failing to fulfill the down payment obligation are well established by Commission rules and precedents. Accordingly, we reject TPS's contention that the Division acted outside its delegated authority. Instead, we find that the Division applied the rules and precedent in a manner that should have been predictable to any participant in the Commission's auctions.

D. TPS's Status as a Successful Bidder Does Not Obviate its Default

19. Finally, TPS asserts that the Commission's retention of TPS's pre-auction upfront payment makes the Division's dismissal of TPS's long-form applications erroneous as a matter of law. TPS's assertion lacks any merit. Pursuant to the Communications Act, the Commission must return pre-auction deposits to unsuccessful bidders within forty-five (45) days after the close of an auction.⁶⁰ At the close of Auction No. 35, TPS was a successful bidder, holding high bids on four licenses. Accordingly, the Commission did not return TPS's pre-auction deposits within forty-five (45) days. Retention of those funds, however, does not confer any particular status on TPS's long-form applications for licenses. In order to obtain its licenses, TPS still had to complete the license application process, which includes timely making a full post-auction down payment. Given TPS's default, the Division properly dismissed TPS's long-form applications pursuant to Commission rule. The Commission is handling TPS's deposits in accordance with its rules governing defaulters.⁶¹

IV. ORDERING CLAUSES

20. Accordingly, for the foregoing reasons, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), 309(j), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), and 405, and sections 0.331 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.106, the Reconsideration Petition filed by TPS Utilicom, Inc. IS DENIED.

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find that deferring consideration of basic qualifying issues until after the auction is fairer and ultimately more efficient than resolving any issues relating to the basic qualification of all pending applicants. . .").

⁵⁹ See *Procedures Public Notice*, 15 FCC Rcd at 19,491 ("It is the responsibility of all prospective bidders to remain current with all Commission rules and with all public notices and pronouncements, including orders on delegated authority or by the Commission relevant to one or more of the licenses or otherwise pertaining to this auction."). Section 0.406 of the Commission's rules instructs those having business before the Commission to familiarize themselves with any applicable regulations. 47 C.F.R. § 0.406.

⁶⁰ See 47 U.S.C. § 309(j)(8)(C)(i).

⁶¹ 47 C.F.R. § 1.2106(e) (In the event a payment "is assessed pursuant to §1.2104 for bid withdrawal or default, upfront payments or down payments on deposit with the Commission will be used to satisfy the bid withdrawal or default payment . . ."); see also 47 C.F.R. § 1.2104, 1.2109, 1.2107.

21. It is FURTHER ORDERED that copies of this Order on Reconsideration will be sent to TPS Utilicom, Inc. and its representative by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham
Deputy Chief
Wireless Telecommunications Bureau