

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

In the Matter of)
)
QUALCOMM Incorporated)
) WT Docket 02-234
Request for Waiver of Auction Discount)
Voucher Terms and Conditions)
)
)
)

ORDER

Adopted: June 2, 2004

Released: June 2, 2004

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we deny a request by QUALCOMM Incorporated ("Qualcomm") to extend the time period in which it may use its Auction Discount Voucher ("ADV") to October 31, 2004. On our own motion, we establish a uniform deadline of September 8, 2004 for Qualcomm or any transferee to use the ADV with respect to either winning bids in pending auctions or installment payments for winning bids in eligible past auctions. For the reasons set forth below, we are not persuaded by Qualcomm's request for an extension. However, we conclude that the ADV will serve its purpose more effectively if Qualcomm and any potential transferees have a standard uniform deadline for use of the ADV with respect to either pending winning bids or installment payments for past winning bids. Accordingly, by this Order, we establish a standard deadline of September 8, 2004 for any use of the ADV with respect to any eligible winning bid. Otherwise, all other terms and conditions of Qualcomm's ADV remain unchanged and in effect.

II. BACKGROUND

2. On June 8, 2000, the Commission granted Qualcomm an ADV in the amount of \$125,273,878, pursuant to the mandate of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in Qualcomm v. FCC. The Commission gave Qualcomm three years from the effective date of the Qualcomm ADV Order (i.e., until June 8, 2003) to use the ADV pursuant to certain terms and conditions. One condition was that Qualcomm, or any third party designated by Qualcomm (i.e., a transferee), could use the ADV only with respect to winning bids in any Commission auction in which the

1 See Letter from Veronica M. Ahern, counsel for Qualcomm, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated April 22, 2004 ("Extension Request").

2 See Qualcomm Incorporated Petition for Declaratory Ruling Giving Effect to the Mandate of the District of Columbia Circuit Court of Appeals, Order, 16 FCC Rcd 4042 (2000) (Qualcomm ADV Order). See also Qualcomm v. FCC, 181 F. 3d 1370 (D.C. Cir. 1999).

3 Qualcomm ADV Order, 16 FCC Rcd at 4051-52, ¶¶ 27-36.

short-form applications (FCC Form 175) were accepted after June 8, 2000, the effective date of the *Qualcomm ADV Order*, and before June 8, 2003, three years later.⁴

3. Two years after receiving the ADV, Qualcomm requested a waiver of the condition that the ADV only could be used with respect to winning bids in auctions taking place after June 8, 2000.⁵ Specifically, Qualcomm sought to use the ADV to satisfy certain third party installment obligations with respect to winning bids in prior auctions.⁶ Noting the limited opportunity that Qualcomm had to utilize the ADV in auctions conducted after June 8, 2000, the Commission found that Qualcomm's ADV "no longer constitute[d] the 'appropriate remedy' that the D.C. Circuit instructed the Commission to fashion."⁷ Therefore, Commission granted Qualcomm's request and allowed the ADV to be used to satisfy certain obligations arising from winning bids in Auctions 5, 10, or 11.⁸ This alternative use of the ADV, the Commission concluded, would provide "a more effective vehicle for ensuring that Qualcomm promptly receives the relief to which it is entitled under the [D.C. Circuit's] mandate."⁹ The Commission maintained all other terms and conditions placed on the ADV in the *Qualcomm ADV Order*.¹⁰

4. The following year, Qualcomm requested an additional year (*i.e.*, until June 8, 2004) to use the outstanding remainder of the ADV.¹¹ In support of its request, Qualcomm asserted that, despite its diligent efforts, there had been limited opportunity to use the ADV within the three-year period and that an additional year would help finalize ongoing negotiations with potential licensees to use the ADV.¹² In addition, Qualcomm indicated that it was considering using the ADV in connection with Auction No. 49, which was scheduled to begin on May 28, 2003 but that it was concerned that use of the ADV might be delayed due to unexpected circumstances.¹³ The Wireless Telecommunications Bureau (Bureau) granted the one-year extension of time, finding it "reasonable to promote the original objective of the ADV."¹⁴ The Bureau noted the diligent efforts by Qualcomm to use the ADV within the three year term and agreed that any "unexpected delays" in Auction No. 49 could prevent Qualcomm from using the ADV with respect to winning bids in that auction.¹⁵ Finding that it had "no reason to disagree with Qualcomm's belief that a year's extension should provide Qualcomm with sufficient time to fully use the

⁴ *Id.* at 4051, ¶¶ 29-31. Other limitations on the use of the ADV include: (i) it must be used only for acquiring licenses that will use Code Division Multiple Access technology; (ii) it could be used only for the downpayment or final payment of licenses won at auction and not for an upfront payment or withdrawal or default payments; and (iii) Qualcomm or the transferee must notify the Commission of its use prior to the "ready to grant" Public Notice. *Id.* at 4051-52, ¶¶ 28, 32, 35

⁵ See Qualcomm Incorporated Petition for Waiver of Certain Terms and Conditions of Its Auction Discount Voucher, WT Docket No. 02-234, *Order*, 17 FCC Rcd 24311, 24313, ¶ 6-8 (2002) (*Qualcomm Waiver Order*).

⁶ *Qualcomm Waiver Order*, 17 FCC Rcd at 24313, ¶ 8.

⁷ *Id.* at 24314, ¶ 10.

⁸ *Id.* at 24314, ¶ 9, 13.

⁹ *Id.* at 24314, ¶ 11.

¹⁰ *Id.* at 24314-15, ¶¶ 12, 15.

¹¹ See Qualcomm Incorporated Petition for Waiver of Auction Discount Voucher Terms and Conditions, WT Docket No. 02-234, *Order*, 18 FCC Rcd 8048, 8049, ¶ 4 (WTB 2003) (*Qualcomm Extension Order*).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 8049, ¶ 7.

¹⁵ *Id.* at 8050, ¶ 7.

ADV,”¹⁶ the Bureau granted the additional one-year but maintained all other terms and conditions of the ADV.¹⁷

5. On April 22, 2004, Qualcomm submitted the instant request to extend the term of the ADV through October 31, 2004.¹⁸ Noting that only a small fraction of the original ADV amount remains,¹⁹ Qualcomm asserts that it has “continued to make good use of the ADV” and is “in serious discussions with a number of parties to use up [the] balance by the June 8th deadline.”²⁰ Nonetheless, given that the potential transaction or transactions may not be completed by the deadline, Qualcomm asks for an extension of time to use the ADV for an additional five months, *i.e.*, until October 31, 2004. In support of its request, Qualcomm asserts that the Commission should consider Qualcomm’s “diligent and successful efforts” to use the ADV to date, “the long period during which no suitable opportunity to use the ADV was available,” and its contention that this extension of time would be consistent with D.C. Circuit’s mandate for equitable relief.²¹

III. DISCUSSION

6. We are not persuaded by Qualcomm’s arguments that a further extension is warranted. Qualcomm essentially relies on the same grounds which supported the grant of both the ADV’s alternative use (*i.e.*, using it for past winning bids) and Qualcomm’s first extension request. While these factors were appropriate to the previous relief sought by Qualcomm, they are not as persuasive now given the relief already granted to Qualcomm and the relatively small amount of the ADV that remains. Nonetheless, for reasons discussed below, we conclude that the two uses of the ADV, with respect to winning bids in pending auctions and with respect to winning bids in certain past auctions, should be governed by a single, uniform deadline. More specifically, we find that establishing a standard deadline applicable to using the ADV with respect to pending or past winning bids will enhance the ADV by standardizing the period when Qualcomm or any potential transferee may use the remainder of the ADV. We further find that using September 8, 2004 as the standard deadline is substantially consistent with the ADV’s existing terms, while allowing Qualcomm and potential transferees sufficient time to take the standard deadline into account. Accordingly, on our own motion, we establish a standard deadline of September 8, 2004 for Qualcomm or any transferee to use the ADV with respect to any winning bid, either in pending or past auctions.

7. As an initial matter, we are not inclined to grant Qualcomm’s request for a second extension until October 31, 2004 to use the ADV. We agree with Qualcomm that it has made substantial progress in using the ADV since we granted its first request for a one-year extension. We do not agree, however, with Qualcomm’s representation that it has had limited opportunity to use the ADV. In fact, Qualcomm’s own successful efforts – including using over 95 percent of the ADV – are evidence to the contrary. Since the Commission created the alternative use of the ADV in the *Qualcomm Waiver Order*, Qualcomm has had approximately one and a half years to negotiate agreements with other licensees to use the ADV for obligations arising from winning bids in Auctions 5, 10, and 11, and it has done so

¹⁶ *Id.* at 8050, ¶ 8.

¹⁷ *Id.* at 8050, ¶ 7.

¹⁸ Extension Request at 1.

¹⁹ *Id.* Qualcomm states that, as of April 29, 2004, \$5,751,251.01 of the original \$125,273,878, or less than five percent, of the ADV remains outstanding. See Letter from Veronica M. Ahern, counsel for Qualcomm, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated April 29, 2004 (“Extension Request Supplement”).

²⁰ Extension Request at 1-2.

²¹ *Id.* at 2.

successfully, as Qualcomm itself indicates.²² Thus, it appears that not using the ADV's full amount during this period is not a result of "no suitable opportunity," but rather the result of Qualcomm's business choices. Even assuming, *arguendo*, that the remainder of the ADV exceeds potential transferees' current obligations (which Qualcomm does not assert), Qualcomm and its transferees could use the ADV to satisfy transferees' future installment obligations in advance.

8. We likewise disagree with Qualcomm's implication that another extension is needed for the Commission to comply with the D.C. Circuit's mandate. Last year, we found in the *Qualcomm Extension Order* that an additional year was both reasonable to promote the original objective of the ADV and consistent with the equitable remedy mandated by the D.C. Circuit.²³ First, we believe that the D.C. Circuit's mandate for an equitable remedy has been more than satisfied with the original grant of the ADV, the later grant of the alternative use of the ADV, and the one-year extension of time. Second, the grant of another extension of time, without any specific cause preventing the use of the ADV, would be contrary to the Commission's original objective in the *Qualcomm ADV Order* to give Qualcomm flexibility but with certain terms and conditions, including a limit on time to use the ADV.²⁴ Finally, we note that Qualcomm represented in its first extension request that the one year it had requested would be sufficient to use the remainder of the ADV and we saw no reason to disagree with their assertion.²⁵ Qualcomm, however, has not provided any specific reason in its instant request why that representation proved to be incorrect. Given that we have granted one extension based on Qualcomm's assurances that the additional time it had requested would be enough, we are disinclined to grant a further extension. For all of these reasons, we deny the Extension Request.

9. Separate from Qualcomm's Extension Request, we find that standardizing the deadline for the two potential uses of the ADV, with respect to pending winning bids and with respect to installment payments for past winning bids, will enhance the ADV's effectiveness. In the *Qualcomm ADV Order*, the Commission required that Qualcomm use the ADV with respect to winning bids in auctions in which the short-form applications had been submitted prior to June 8, 2003. This limited the time in which the ADV could be used. In the *Qualcomm Waiver Order*, the Commission permitted Qualcomm, through a transferee, to use the ADV with respect to installment payments for winning bids in Auctions 5, 10, and 11. The *Qualcomm Extension Order* provided "an additional year in which to use the ADV until June 8, 2004."²⁶ In the time since the *Qualcomm Extension Order*, Qualcomm has transferred over half the ADV to third parties and Qualcomm has indicated that it is in negotiations to transfer the remainder of the ADV to third parties.²⁷ Uncertainty regarding when the ADV may be used with respect to winning bids in pending auctions may impede transfer negotiations, and in turn diminish the ADV's effectiveness in providing the intended relief to Qualcomm. We believe that, in contrast, a standard deadline for using the ADV for winning bids in both pending and past auctions would simplify transfer negotiations and enhance the ADV's effectiveness. Therefore, on our own motion, we conclude that we should standardize the deadline for all potential uses of the ADV.

10. We believe that we should standardize the deadline to use the ADV without altering the terms of the ADV, as modified by the *Qualcomm Waiver Order* and the *Qualcomm Extension Order*, any more than necessary, while giving Qualcomm and potential transferees a reasonable amount of time to take the standard deadline into account. We conclude that establishing a standard deadline of September

²² *Id.*

²³ See *Qualcomm Extension Order* at 8049-50, ¶ 7, 8.

²⁴ See *Qualcomm ADV Order* at 4051, ¶ 29.

²⁵ See *Qualcomm Extension Order* at 8050, ¶ 7.

²⁶ *Qualcomm Extension Order* at 8050, ¶ 9.

²⁷ See Extension Request at 2.

8, 2004, provides an appropriate amount of time for all potential uses of the remainder of the ADV. With respect to potential winning bids in pending auctions, the last auction for which short-form applications will be due prior to June 8, 2004 is Auction No. 56. However, the auction will not begin until July 28, 2004 and winning bids will not be determined until the close of the auction.²⁸ We believe that applying a standard deadline of September 8, 2004, or six weeks from the scheduled start of the auction, is appropriate, given the benefit of establishing a standard deadline; the interest in minimizing changes to the ADV; and taking into account that while the possibility remains, Qualcomm has not indicated an intent to use the ADV with respect to Auction No. 56. With respect to installment payments for prior winning bids, three months from the June 8, 2004 expiration is slightly more than three months or one quarter from the effective date of this Order. Because an entire quarter will pass before the standard deadline, all potential transferees will have one quarterly installment payment due before the ADV expires and should have sufficient time to consider use of the ADV, which should, in turn, enhance the ADV's effectiveness.

11. Finally, we note that, unless extraordinary circumstances exist to warrant any additional time, we expect Qualcomm and any transferees to use the remainder of the ADV with respect to pending or past winning bids by the standard deadline of September 8, 2004. We find that the amount of the time given to Qualcomm suffices as an appropriate, equitable remedy in response to the D.C. Circuit's mandate.

IV. CONCLUSION

12. We find no basis for granting Qualcomm's request for a second extension of time to use the remainder of its ADV until October 31, 2003, and, therefore, deny its request. On our own motion, we find it appropriate to standardize the deadline for using the ADV both with respect to pending and past winning bids, while maintaining all other terms and conditions of the ADV. Thus, we establish a standard deadline of September 8, 2004 for all uses of the ADV.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED THAT, these actions ARE TAKEN pursuant to Sections 1, 4(i), 303(r), 309(j), and 402(h) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 309(j), and 402(h).

14. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 155(c), and the authority delegated pursuant to sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, the request by QUALCOMM Incorporated for an extension of time to use the remainder of its Auction Discount Voucher IS DENIED.

15. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 155(c), and the authority delegated pursuant to sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, the deadline for any use of the Auction Discount Voucher held by QUALCOMM Incorporated, by Qualcomm or its transferees, with respect to either pending or past winning bids, is September 8, 2004.

16. IT IS FURTHER ORDERED THAT all the other terms and conditions of the ADV remain in effect.

²⁸ See Auction of 24 GHz Service Licenses Scheduled for July 28, 2004, Notice And Filing Requirements, Minimum Opening Bids, Upfront Payments And Other Auction Procedures, Report No. AUC-04-56-B (Auction No. 56), *Public Notice*, DA 04-633 (WTB, March 12, 2004), at 8.

17. IT IS FURTHER ORDERED THAT this Order shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

John B. Muleta
Chief
Wireless Telecommunications Bureau