



Federal Communications Commission
Washington, D.C. 20554

December 13, 2004

DA 04-3884

Janet Fitzpatrick Moran, Esq.
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037-1350

Re: Request to Modify Post-Auction Payment Procedures for Auction No. 58

Dear Ms. Moran:

This letter responds to your request dated November 19, 2004, on behalf of Wirefree Partners, Inc. ("Wirefree"), seeking an extension of the Federal Communications Commission's ("Commission") final payment deadline for licenses that may be won in Auction No. 58.¹ Specifically, you request that the Commission revise the final payment deadline to allow winning bidders to submit their final payments after the Commission announces that it is ready to grant the licenses won at auction.² Alternatively, you ask for a decision that, in the event that a winning bidder defaults, the Commission will "not retain more than 20% of an applicant's total bid as an interim default penalty until a final decision penalty can be computed under Section 1.2104(g)(2)."³ For the reasons set forth below, we deny these requests.

Section 1.2109(a) of the Commission's rules states that auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following the release of a public notice establishing the payment deadline.⁴ Pursuant to its delegated authority,⁵ the Wireless Telecommunications Bureau ("Bureau") released the *Auction No. 58 Procedures Public Notice* in September of 2004 and clearly stated that winning bidders would be

¹ Letter from Janet Fitzpatrick Moran, Counsel for Wirefree Partners, Inc., to John Muleta, Chief, Wireless Telecommunications Bureau, dated November 19, 2004 ("Wirefree Request").

² *Id.* at 1.

³ *Id.* at 1, 3.

⁴ 47 C.F.R. § 1.2109.

⁵ See 47 C.F.R. § 0.131; see also Amendment of Part 1 of the Commission's Rules — Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5697-98 (1997) ("We also clarify that pursuant to Section 0.131 of our rules, the Chief, Wireless Telecommunications Bureau, has delegated authority to implement all of the Commission's rules pertaining to auctions procedures.").

required to make down payments on their winning bids (i.e., bring their amounts on deposit with the Commission to 20 percent of the net amount of their winning bids) within ten business days of the release of a public notice announcing the close of Auction No. 58.⁶ The *Auction No. 58 Procedures Public Notice* also established that winning bidders would be required to make their final payments (i.e., the remaining 80 percent balance of their net winning bids) within 10 business days after the deadline for submitting down payments.⁷

Now, practically on the eve of the Auction No. 58 short-form filing deadline, Wirefree asks the Bureau to change its announced procedures by requiring payment of the final 80 percent balance after the Commission is ready to grant the licenses.⁸ Wirefree contends that the payment deadline should be changed “because the requirement to pay 100% of the bid has a disproportionately negative impact on small businesses.”⁹ In support of its request, Wirefree cites the *Part 1 Third Report and Order*¹⁰ and to the decision in the recent FM broadcast auction requiring full payment after the broadcast licenses are ready to be granted.¹¹

One of the primary objectives of the Commission’s auction rules is to ensure that only serious, financially qualified applicants be awarded licenses so as to expedite provision of service to the public.¹² The Commission has determined that timely payment of auction obligations is one of the means by which it can be assured of the financial qualifications, and thus the seriousness, of a winning bidder.¹³ The Commission has also stated that those entities

⁶ “Broadband PCS Spectrum Auction Scheduled for January 12, 2005; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 58,” *Public Notice*, 19 FCC Rcd 18190, 18226 (WTB 2004) (“*Auction No. 58 Procedures Public Notice*”).

⁷ *Id.*

⁸ Wirefree Request at 1, 3.

⁹ *Id.* at 2.

¹⁰ *Id.* at 2, citing Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 432 (1997) (*Part 1 Third Report and Order*) (“concerns regarding delayed payment are outweighed by the risk and uncertainty that would be imposed on an applicant if it were required to make its full payment while a petition against its application was still pending....”).

¹¹ Wirefree Request at 2.

¹² 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, 2375 (1994) (*Competitive Bidding Second Report and Order*); Mountain Solutions LTD, Inc., 12 FCC Rcd 5904, 5907-08 (WTB 1997), *aff’d*, 13 FCC Rcd 21983 (1997), *review denied in part and dismissed in part*, Mountain Solutions LTD, Inc. v. F.C.C., 197 F.3d 512 (D.C. Cir. 1999). See also Request of GLH Communications, Inc. for Temporary Waiver of Installment Payment Deadlines (47 C.F.R. § 1.2110(g)(4) and Debt Collection Rules (47 C.F.R. §1901 et seq.), *Order*, 18 FCC Rcd 14695, 14698-99 (WTB-AIAD 2003).

¹³ See BDPCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 3230, 3235 (1997) (*BDPCS MO&O*) (“[I]n order to maintain the integrity of the auction process, and to ensure the efficient provision of services to the public,

that plan to participate in an auction must have the appropriate financing in place before the start of the auction.¹⁴ Moreover, when establishing the payment schedule for licenses won at auction, the Bureau seeks to further the public interest by ensuring full payment and minimizing the opportunity to “game” the processes.¹⁵

Given these considerations, we find that Wirefree has failed to justify a change to the current Auction No. 58 post-auction payment schedule or that such a change is called for by Section 309(j) or Commission precedent.¹⁶ In a series of rulemaking decisions, the Commission addressed the hurdles that small businesses may face in accessing capital by setting aside certain broadband PCS spectrum licenses and establishing bidding credits as a means of providing opportunities for small businesses to participate in the spectrum auction program, thus meeting its statutory mandate.¹⁷ Moreover, we disagree with the assertion made in the Wirefree Request that the Commission, in the *Part 1 Third Report and Order*, intended to formally tie the final winning bid payment to the grant of a license.¹⁸ The partial statement from the *Part 1 Third Report and Order* cited in the Wirefree Request was made in the context of the Commission’s shortening the petition to deny period. This action was taken to reduce the time between the end of the auction and the granting of licenses for unchallenged applications. Thus, if anything, such action supports linking the final payment to the close of the auction by generally decreasing the time before a license can be granted.

We also do not find the post-auction payment schedule established in the recent FM broadcast auction to be relevant or applicable to the procedures established for Auction No. 58. In that case, specific Part 73 rules provided that final payment would be due after the release of a public notice announcing that the broadcast construction permits were ready to be granted.¹⁹

auction participants are held to certain obligations, such as meeting relevant financial deadlines.”), *recon. denied in part and granted in part*, 12 FCC Rcd 15341 (1997). As the Commission has stated, awarding licenses to those who value them the most encourages growth while maintaining safeguards against anticompetitive behavior. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2349-50.

¹⁴ See 47 C.F.R. § 1.2105(a)(2)(v). See also Requests for Extension of the Commission’s Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22071, 22072 (1998).

¹⁵ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2381-82.

¹⁶ 47 U.S.C. § 309(j).

¹⁷ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-82 (1994). See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 420-21 (1994); Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communication Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16266 (2000).

¹⁸ Wirefree Request at 2.

¹⁹ See 47 C.F.R. §§ 73.3573(f)(5)(ii); 73.5006(d).

However, the *Auction No. 37 Procedures Public Notice* also noted that the Bureau and the Media Bureau were considering changes to the broadcast rules to conform the Part 73 final payment deadline with the analogous payment process consistent with Part 1 rules.²⁰ Regardless, for Auction No. 58 purposes, neither Part 1 nor Part 24 of the Commission's rules ties the payment deadline to license grant. In fact, at least five of the most recently announced auctions for non-broadcast licenses required that the balance of the winning bid be paid within ten business days after the deadline for submitting down payments.²¹ In each of these wireless auctions, the Bureau implemented this procedure without any noted problems from small businesses in complying with a post-auction payment schedule similar to the one established for Auction No. 58.

Additionally, we believe that any change to the payment schedule for Auction No. 58 at such a late date would be contrary to the public interest and detrimental to the integrity of the auction process. As noted above, the Bureau announced the Auction No. 58 procedures on September 16, 2004.²² Wirefree made its request on November 19, 2004, after the short-form filing window had opened for Auction No. 58 and only a few business days before the filing deadline.²³ Revising the auction payment schedule either during or after the short-form filing window, as requested by Wirefree, may deny potential bidders sufficient time to make changes to business plans developed based on deadlines established more than two months before the Wirefree Request was filed. Moreover, we find that the Wirefree Request does not provide compelling reasons to warrant such a change.²⁴

Similarly, we find that Wirefree has failed to provide a basis for a change in the Commission's policy regarding the retention of a bidder's monies on deposit in the event of a post-auction default. Where a winning bidder or licensee defaults and the defaulted license has

²⁰ See Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures, Public Notice, 19 FCC Rcd 10570, 10605 (WTB/MB 2004).

²¹ See, e.g., "Auction of Licenses in the Multichannel Video Distribution and Data Service Rescheduled for January 14, 2004; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures, Public Notice, 18 FCC Rcd 17553, 17588 (WTB 2003). The Bureau has also exercised this discretion in Auction Nos. 52, 55, 56 and 57.

²² See, generally, *Auction No. 58 Procedures Public Notice*.

²³ The Wirefree Request was filed November 19, 2004, leaving only 5 business days before the close of the short-form filing deadline of November 30, 2004.

²⁴ In addition, we note that the Wirefree Request is essentially seeking reconsideration of the Bureau's action in the *Auction No. 58 Procedures Public Notice* establishing the final payment deadline. Because the filing was submitted over two months after the release of the *Auction No. 58 Procedures Public Notice*, the Wirefree Request should also be dismissed as an untimely petition for reconsideration. See 47 C.F.R. § 1.106(f) (petitions for reconsideration must be filed within 30 days); see also 47 U.S.C. § 405 (limiting the Commission's power to consider petitions for reconsideration to those filed within 30 days from public notice of the order, decision, report or action complained of).

yet to be reauctioned, the Commission generally assesses an initial default payment of between three percent (3%) and twenty percent (20%) of the defaulted bid amount.²⁵ In exercising our discretion to refund amounts above that range, we will continue to review the particular circumstances underlying a bidder's default.²⁶

This action is taken pursuant to authority delegated pursuant to Section 0.331 of the Commission's rules.²⁷

Sincerely,

John B. Muleta
Chief
Wireless Telecommunications Bureau

²⁵ See *Part 1 Third Report and Order*, 13 FCC Rcd at 434; see also 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

²⁶ See Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, to Raymond Quianzon, counsel to TPS Utilicom, Inc, 18 FCC Rcd 21332 (WTB 2003).

²⁷ 47 C.F.R. § 0.331.