

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

In the Matter of)
)
Advance Acquisition, Inc.)
Request for Waiver of Bid Withdrawal Payment)

ORDER

Adopted: October 22, 2007

Released: October 22, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a Request for Waiver and an Amended Request for Waiver submitted by Advance Acquisition, Inc. (“Advance”), seeking relief from the bid withdrawal payment obligation that Advance incurred under Section 1.2104(g) of the Commission’s rules as a result of withdrawing a provisionally winning bid during Auction No. 37.¹ During this auction of FM broadcast construction permits, Advance withdrew its provisionally winning bid on the construction permit for Yarnell, Arizona.² At the end of the auction, the Yarnell permit remained unsold and a final bid withdrawal payment could not be calculated; therefore, Advance was assessed an interim bid withdrawal payment in accordance with Section 1.2104(g)(1).³ The Yarnell permit was subsequently sold in Auction No. 62 for an amount less than Advance’s withdrawn bid, and a final bid withdrawal payment was then assessed, again pursuant to Section 1.2104(g)(1). In its Request for Waiver, Advance seeks a reduction of its bid withdrawal payment to the amount of the interim assessment. In its Amended Request for Waiver, Advance requests that the Wireless Telecommunications Bureau and the Media Bureau (“Bureaus”) waive Section 1.2104(g)(1) generally. For the reasons discussed below, we grant Advance’s request for a waiver of that portion of Section 1.2104(g)(1) that prescribes final bid withdrawal payments. We do not, however, waive the part of the rule that prescribes interim bid withdrawal payments.

II. BACKGROUND

2. Prior to Auction No. 37, which began on November 3, 2004, and concluded on November 23, 2004, the Bureaus jointly released a public notice outlining the terms, conditions, and procedures for the auction.⁴ As with most previous auctions, the Bureaus announced that each bidder would be allowed to make limited use of bid withdrawals; for Auction No. 37, the Bureaus specified that each bidder would be permitted to withdraw a high bid in no more than two rounds.⁵ The *Auction No. 37 Procedures Public*

¹ Letter to Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Denise B. Moline, Counsel to Advance Acquisition, Inc., dated November 20, 2006 (“Request for Waiver”); Advance Acquisition, Inc., Amended Request for Waiver of 47 C.F.R. § 1.2104(g)(1), dated May 22, 2007 (“Amended Request for Waiver”). *See also* 47 C.F.R. § 1.2104(g).

² The Yarnell, Arizona, allotment is FM024.

³ 47 C.F.R. § 1.2104(g)(1).

⁴ 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 10,570 (WTB/MB 2004) (“*Auction No. 37 Procedures Public Notice*”).

⁵ *Id.* at 10,602-04.

Notice also explained that a “high bidder that withdraws its standing high bid from a previous round during the auction is subject to the bid withdrawal payments specified in 47 C.F.R. § 1.2104(g).”⁶ The *Auction No. 37 Procedures Public Notice* described how interim and final bid withdrawal payments would be calculated under Section 1.2104(g)(1). Under this provision, if a high bid is withdrawn during an auction, the bid withdrawal payment is the difference between the withdrawn bid and the ultimate winning bid for the license or permit. If a license or permit remains unsold at the end of the auction in which the bid is withdrawn, an interim bid withdrawal payment is assessed, and the final bid withdrawal payment is calculated once the license or permit is sold in a subsequent auction.⁷ At the time of Auction No. 37, Section 1.2104(g)(1) provided that the interim bid withdrawal payment would be 3 percent of the withdrawn bid.⁸

3. Advance applied to participate in Auction No. 37 and was found qualified to do so.⁹ In Round 45 of the auction, Advance submitted a bid of \$6,850,000 for the Yarnell permit. Advance withdrew this bid in Round 52, and the permit remained unsold at the close of the auction.¹⁰ On December 1, 2004, the Bureaus jointly released a public notice announcing the close of the bidding in Auction No. 37.¹¹ Among other things, this public notice quantified the interim and final bid withdrawal payments for bidders that had withdrawn bids during the auction, including Advance. Advance’s interim bid withdrawal payment was \$205,500, i.e., 3 percent of its withdrawn bid of \$6,850,000.¹² Pursuant to Section 1.2104(g)(1), the amount

⁶ *Id.* at 10,603. Section 1.2104(g) provides that “the Commission will impose payments on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.” 47 C.F.R. § 1.2104(g). Section 1.2104(g)(1) prescribes the method of calculating the payment that is imposed when a bid is withdrawn prior to the close of an auction. 47 C.F.R. § 1.2104(g)(1).

⁷ As the *Auction No. 37 Procedures Public Notice* explained, the interim payment, which is applied toward any final bid withdrawal payment that is assessed after the construction permit is sold, ensures that the Commission receives a minimal bid withdrawal payment pending assessment of any final bid withdrawal payment. *Auction No. 37 Procedures Public Notice*, 19 FCC Rcd at 10,604 (citing Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, *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, 15,302 ¶ 15 (2000)). Where a bid that is higher than the withdrawn bid is submitted in the same auction, no bid withdrawal payment is assessed. 47 C.F.R. § 1.2104(g)(1); *Auction No. 37 Procedures Public Notice*, 19 FCC Rcd at 10,603.

⁸ In 2006, the Commission amended Section 1.2104(g)(1) to raise the 3 percent limit on interim bid withdrawal payments to 20 percent. In doing so, the Commission noted that there had been a disproportionate number of bid withdrawals late in auctions, indicating that some bidders had been placing and then withdrawing bids primarily to discourage potential or existing market competitors from seeking to acquire licenses, and expressed its continuing concern that bid withdrawals weaken the integrity of the auctions process and impede the deployment of service to the public. Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, *Report and Order*, 21 FCC Rcd 891, 901-04 ¶¶ 24-32 (2006). The Commission, as part of its determination of competitive bidding procedures in advance of each auction, now establishes the appropriate level, from 3 percent up to a maximum of 20 percent, at which to set interim bid withdrawal payments. *Id.* at 903-04 ¶ 31.

⁹ Auction of FM Broadcast Construction Permits; 456 Bidders Qualified to Participate in Auction No. 37, *Public Notice*, 19 FCC Rcd 19,773 (WTB/MB 2004).

¹⁰ Amended Request for Waiver at 6-7; *see also* FM Broadcast Construction Permits Auction Closes; Auction No. 37 Winning Bidders Announced; Payment and Application Deadlines Established, *Public Notice*, 20 FCC Rcd 1021, Attachment A (WTB/MB 2004) (“*Auction No. 37 Closing Public Notice*”).

¹¹ *See supra* note 10.

¹² *Auction No. 37 Closing Public Notice*, Attachment C.

of \$205,500 was deducted from the upfront payment Advance had submitted to qualify for participation in Auction No. 37.¹³

4. In Auction No. 62, an auction of FM broadcast construction permits that began on January 12, 2006, and concluded on January 31, 2006, the Yarnell permit was offered again and was sold for \$2,234,000.¹⁴ Advance did not file an application to participate in Auction No. 62 and was therefore not a qualified bidder in that auction. On February 8, 2006, in a public notice announcing the close of the bidding in Auction No. 62, the Bureaus announced final bid withdrawal payments for bidders that had withdrawn bids in Auction No. 37 on construction permits that had sold in Auction No. 62, including Advance. The amount of Advance's final bid withdrawal payment on the Yarnell permit was \$4,616,000, which was the difference between its withdrawn bid and the ultimate winning bid for the permit.¹⁵ On October 31, 2006, the Commission issued a letter to Advance assessing the final bid withdrawal payment for the Yarnell permit and instructing Advance to pay \$4,410,500, the balance owed after subtracting the interim bid withdrawal payment, within 30 days of the date of the letter.¹⁶

5. On November 20, 2006, Advance submitted its Request for Waiver, in which it seeks a reduction of its bid withdrawal payment to the amount of the interim assessment, or \$205,500.¹⁷ In support of this request, Advance states that its bidding on the Yarnell permit in Auction No. 37 was based on an engineering analysis that it performed using off-the-shelf computer software that showed that the Yarnell allocation could be upgraded from Class A to Class C3 with relocation of the station closer to Phoenix.¹⁸ According to Advance, as bidding mounted in Auction No. 37, it took the "precautionary" measure of obtaining an analysis from an outside engineering firm to confirm the technical information upon which it was basing its bids for the Yarnell permit. This analysis showed that the information on which Advance had been relying was wrong.¹⁹ Advance maintains that the "erroneous information could not reasonably have been foreseen" and that it and its staff "are not at fault for the error."²⁰ Advance asserts that it did not "game" the auction system by the withdrawal of its high bid, that its withdrawal was "the result of ordinary business prudence and judgment" once it learned that its original technical analysis was wrong, and that, "under the circumstances, Advance took immediate, responsible action."²¹ In addition, Advance argues that

¹³ Section 1.2104(g)(1) provides: "The withdrawal payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission." 47 C.F.R. § 1.1204(g)(1).

¹⁴ Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction No. 62, *Public Notice*, 21 FCC Rcd 1071, Attachment A (WTB/MB 2006) ("*Auction No. 62 Closing Public Notice*"). The gross winning bid for the Yarnell permit was \$2,234,000. Because the winning bidder qualified for a 35 percent bidding credit, the net winning bid it paid to the Commission was \$1,452,100.

¹⁵ *Id.*, Attachment D. Section 1.2104(g)(1) states: "In the event that a bidding credit applies to any of the bids, the bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less." 47 C.F.R. § 1.1204(g)(1). Pursuant to this provision, the gross winning bid of \$2,234,000, rather than the net winning bid of \$1,452,100, was used to calculate Advance's bid withdrawal payment. *See supra* note 14. Advance did not qualify for a bidding credit in Auction No. 37.

¹⁶ Letter to Mark Follett, President, Advance Acquisition, Inc., from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated October 31, 2006.

¹⁷ *See supra* note 1.

¹⁸ Request for Waiver at 4.

¹⁹ *Id.* at 5-6.

²⁰ *Id.* at 7.

²¹ *Id.*

the bid withdrawal payment it has been assessed is inequitable because it exceeds penalties imposed by the Commission against broadcasters that have violated the Commission's rules,²² is out of line with prior bid withdrawal payments and inconsistent with the average value of FM broadcast licenses,²³ and is out of proportion with the winning bid price for the Yarnell permit in Auction No. 62.²⁴ Advance states that while it understands that there should be "some consequence" for its bid withdrawal, it did nothing wrong and should not be subject to a punitive payment.²⁵ Advance also states that it is financially unable to make the required payment.²⁶

6. On May 22, 2007, Advance filed its Amended Request for Waiver.²⁷ Advance argues that a waiver of Section 1.2104(g)(1) in this case will serve the public interest and will not frustrate the underlying purpose of the rule because the purpose of the rule "is not served by assessing a penalty for Advance's good faith bid."²⁸ Reiterating its argument that it relied on generally available third-party software to determine its bidding strategy, Advance asserts that it used its best efforts to ensure that its assumptions regarding the value of the Yarnell permit were correct; that bidding by other parties appeared to confirm its original conclusion that the Yarnell allotment could be upgraded; that it had no reason to believe that the calculations derived from the third-party software were incorrect; that it learned that these calculations were defective only after placing its high bid of \$6,850,000; and that it then had no reasonable alternative to withdrawing its high bid for the permit.²⁹ Advance argues that the purpose of the bid withdrawal payment rule, which is to deter insincere bidding, would not be served by its application in this case because Advance's bidding on the Yarnell permit "was not insincere by any measure."³⁰ Advance also maintains that the bid withdrawal payment it has been assessed is inequitable because, although the bid withdrawal payment rule is not intended to be punitive and although Advance did not violate any Commission rule, the payment assessed is larger than the forfeiture the Commission is permitted to impose on a common carrier for a violation of the Commission's rules.³¹ Advance further asserts that its bid withdrawal payment is particularly inequitable because it is a subsidiary of a non-profit religious broadcaster and again states that it is unable to pay the amount owed.³² Finally, Advance contends that a grant of its waiver request will not affect the

²² *Id.* at 8-10.

²³ *Id.* at 10-11.

²⁴ *Id.* at 11-12.

²⁵ *Id.* at 10, 12, 13-14.

²⁶ *Id.* at 13. On February 22, 2007, Advance supplemented its Request for Waiver by seeking consideration of debt compromise under Section 1.1915 of the Commission's rules, 47 C.F.R. § 1.1915. Letter to Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Denise B. Moline, Counsel to Advance Acquisition, Inc., dated February 22, 2007. Advance subsequently withdrew this supplement. Letter to Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Kathleen Abernathy, Counsel to Advance Acquisition, Inc., dated May 10, 2007.

²⁷ *See supra* note 1.

²⁸ Amended Request for Waiver at 1-2.

²⁹ *Id.* at 2, 3-8, 18-19.

³⁰ *Id.* at 13-14.

³¹ *Id.* at 15-17.

³² *Id.* at 17.

Commission's ability to enforce the bid withdrawal payment rule in the future because the circumstances of its bid withdrawal are exceptional and unlikely to arise again.³³

III. DISCUSSION

7. To obtain a waiver of the bid withdrawal payment rule, Advance must demonstrate that special circumstances warrant a deviation from the rule, or that such a deviation would serve the public interest.³⁴ As explained below, we find that in this case special circumstances warrant a deviation from that part of Section 1.2104(g)(1) that prescribes the final bid withdrawal payment. Specifically, we find that the final bid withdrawal payment assessed in this case is exceptionally high in comparison with previous bid withdrawal payments in that it is the only bid withdrawal payment ever assessed that both exceeds \$4 million and represents more than 200 percent of the ultimate winning bid for the permit or license, and it is therefore higher than necessary to serve the purpose of the rule. We also find, however, that the facts of this case do not warrant a waiver of that part of the rule that prescribes the interim bid withdrawal payment. We therefore waive the amount of Advance's bid withdrawal payment that exceeds the interim assessment.

8. The Commission adopted the bid withdrawal payment rule in 1994 as part of its original competitive bidding rules. In doing so, the Commission explained that "[a]llowing bidders to withdraw bids without ever paying a penalty would encourage insincere bidding. Insincere bidding, whether purely frivolous or strategic, distorts the price information generated by the auction process and reduces its efficiency."³⁵ The Commission also noted that bid withdrawal payments protect the government from the loss of revenue associated with bid withdrawals.³⁶ At the same time, the Commission recognized that bid withdrawal payments that were too high would be detrimental to the auction process because they would tend to discourage the efficient aggregation of licenses. As the Commission explained, "In either sequential or simultaneous auctions, a bidder may bid high on one property in the expectation that it will also win a complementary property, only to find that it is outbid on the complementary property. If the penalty for bid withdrawal is too high, bidders will tend to be too cautious in attempting to aggregate licenses."³⁷ The Commission has also recognized in other contexts that bid withdrawal payments should not be excessively high. Thus, in *Atlanta Trunking Associates* the Commission prescribed guidelines for assessing bid withdrawal payments in cases where bidders made typographical errors in submitting bids, explaining that the guidelines would provide for bid withdrawal payments that are "substantial enough to discourage strategic placement of erroneous bids without being so severe as to impose an untenable burden on bidders."³⁸

9. The amount of Advance's withdrawal payment does not trigger concern on grounds we have previously recognized. First, because bidders do not normally seek to aggregate broadcast construction permits in the same way they seek to aggregate wireless communications licenses, the efficient aggregation

³³ *Id.* at 18-19.

³⁴ In re Application of Delta Radio, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 16,889, 16,891 ¶ 7 (2003). See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)); 47 C.F.R. § 1.3 ("Any provision of the rules may be waived . . . on petition if good cause therefor is shown.").

³⁵ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2373 ¶ 147 (1994) ("*Competitive Bidding Second Report and Order*").

³⁶ *Id.* at 2374 ¶ 152.

³⁷ *Id.* at 2373 ¶ 148.

³⁸ *Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C., Order*, 11 FCC Rcd 17,189, 17,198 ¶ 19 (1996) ("*Atlanta Trunking Associates*").

of licenses is not a significant concern in auctions of FM permits such as Auction No. 37. Advance's case also does not involve facts similar to those in *Atlanta Trunking Associates* or other early cases in which auction participants submitted erroneous bids due to typographical errors.³⁹ Nevertheless, we find that the dual goal of deterring insincere bidding while avoiding excessive burdens on bidders is equally relevant here. Advance's final bid withdrawal payment is not only unusually high in comparison with previous bid withdrawal payments but also unique in that it is the only bid withdrawal payment ever assessed that both exceeds \$4 million and represents more than 200 percent of the ultimate winning bid for the permit or license. If we were to enforce it, Advance's final bid withdrawal payment would also be the highest bid withdrawal payment, as an absolute number, ever imposed in the history of the auctions program.⁴⁰

10. Bid withdrawal payments over \$4 million have been rare; only two have previously been imposed.⁴¹ These bid withdrawal payments were not excessive, however, because in both cases they represented less than 5 percent of the ultimate winning bids for the licenses and therefore were in keeping with the value of the licenses as reflected by the prices paid for them.⁴² In contrast, Advance's final bid withdrawal payment exceeds 200 percent of the sale price of the Yarnell construction permit.⁴³ In reviewing these facts, we find that where license values are high a bid withdrawal payment of over \$4 million is not necessarily excessive or out of line with the Commission's goals in imposing bid withdrawal payments. Similarly, we find that a bid withdrawal payment that is over 200 percent of the ultimate winning bid for a

³⁹ Following the submission of mistaken bids that contained typographical errors in the early years of the auctions program, the Commission implemented various system enhancements to reduce the possibility of such types of erroneous bids. *See, e.g., Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C.; Georgia Independent PCS Corporation, Memorandum Opinion and Order*, 12 FCC Rcd 6382, 6388 ¶ 11 (1997). Typographical errors have ceased to be a problem in Commission auctions.

⁴⁰ Voicestream PCS BTA I License Corporation ("Voicestream"), a subsidiary of T-Mobile USA, Inc., was assessed a higher bid withdrawal payment—\$4,639,000—after withdrawing a high bid in Auction No. 35, an auction of Personal Communications Services ("PCS") licenses. However, the license on which Voicestream had withdrawn its high bid ultimately could not be sold because a license for the same spectrum had been issued to NextWave Personal Communications Inc. ("NextWave") and the Supreme Court ruled that the Commission was prohibited under bankruptcy law from canceling licenses on which NextWave had failed to timely submit installment payments. The bid withdrawal payment assessed against Voicestream was therefore waived and refunded. Letter to Robert A. Calaff, Senior Corporate Counsel, T-Mobile USA, Inc., and James H. Barker, Counsel for Leap Wireless International, Inc., from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated September 5, 2003, 18 FCC Rcd 18,349 (2003). In certain early bid withdrawal cases involving typographical errors, bid withdrawal payments well over \$4 million might have been imposed. Indeed, because the errors involved adding extra zeroes to bids, certain bid withdrawal payments might have amounted to tens of millions of dollars. As explained above, however, the Commission established guidelines for reducing bid withdrawal payments in cases of typographical errors. *See supra* para. 8.

⁴¹ Wireless Co. paid bid withdrawal payments of \$4,468,990 and \$4,036,163 after withdrawing high bids in Auction No. 4, an auction of PCS licenses. Commercial Mobile Radio Service Information: Announcing the Winning Bidders in the FCC's Auction of 99 Licenses to Provide Broadband PCS in Major Trading Areas; Down Payments Due March 20, 1995, *Public Notice*, PNWL95-28 (WTB March 13, 1995).

⁴² The license for which Wireless Co. was assessed a bid withdrawal payment of \$4,468,990 sold for \$89,786,837; thus, the bid withdrawal payment was less than 5 percent of the winning bid. The license for which Wireless Co. was assessed a bid withdrawal payment of \$4,036,163 sold for \$83,888,837; again, the bid withdrawal payment was less than 5 percent of the winning bid. Wireless Co.'s withdrawn bids for the two licenses were \$94,255,827 and \$87,925,000, respectively.

⁴³ As explained above, Advance's final bid withdrawal payment was calculated based on the gross winning bid for the Yarnell permit in Auction No. 62, which was \$2,234,000. Advance's final bid withdrawal payment is 207 percent of this amount. If Advance's final bid withdrawal payment had been calculated based on the amount of the net winning bid for the permit, which was \$1,452,100, it would have been 318 percent of that amount. *See supra* note 15.

license is not *per se* excessive; there may be many cases in which license values are relatively low and a bid withdrawal payment of more than 200 percent of the sale price is not unreasonable. We do find, however, that where a bid withdrawal payment exceeds both \$4 million and 200 percent of the ultimate winning bid for the license, as is the case here, it is unnecessarily high to achieve the purpose of Section 1.2104(g)(1).

11. We make no findings regarding Advance's argument that it had no reason to believe that its original engineering analysis for the Yarnell allotment was incorrect, and we do not base our decision on Advance's claim that it relied on faulty third-party software. The nature of the error Advance alleges is not as clear-cut as the typographical errors the Commission considered in the early years of the auctions program. We also agree with the Commission's observation in *Atlantic Trunking Associates* that "it may be extremely difficult for the Commission to distinguish between 'innocent' erroneous bids and 'strategic' erroneous bids."⁴⁴ In addition, all participants in Commission auctions are responsible for performing adequate due diligence in deciding whether and how much to bid for any particular construction permit or license. We therefore emphasize that we do not consider Advance's allegations of third-party mistake to be a justification for a waiver of the bid withdrawal payment rule. At the same time, however, Advance has asserted under penalty of perjury that it did not bid insincerely for the Yarnell permit, and we find no evidence of its having done so. If there were such evidence, we would not grant a waiver in this case.

12. We also do not accept Advance's argument that its bid withdrawal payment is inequitable because it is higher than forfeitures imposed for violations of the Commission's rules. The statutory and regulatory provisions that govern such forfeitures have different purposes than the Commission's bid withdrawal payment rule. Moreover, the factors involved in any particular forfeiture case will be different from the factors involved in the assessment of a bid withdrawal payment under Section 1.2104(g)(1). Any comparison of forfeitures and bid withdrawal payments is therefore irrelevant to a consideration of the equitableness of the latter.

13. In addition, we do not base our decision in this case on Advance's argument that it is unable to pay the final bid withdrawal payment it has been assessed. Rather, we base our decision solely on the fact that the bid withdrawal payment at issue here is exceptionally high—i.e., over both \$4 million and 200 percent of the ultimate winning bid for the permit—and therefore higher than necessary to serve the purpose of the rule. All auction participants must be prepared to pay their bids and should not incur debt obligations they are financially unable to meet. Therefore, inability to pay does not by itself justify a waiver of the Commission's bid withdrawal payment rule.⁴⁵

14. We also reject Advance's assertion that its bid withdrawal payment is inequitable because it is a subsidiary of a non-profit religious broadcaster, Starboard Media Foundation, Inc. Advance is a self-described for-profit business created to acquire property "unrelated to Starboard's non-profit operations."⁴⁶ Furthermore, the Commission does not apply its rules differently to for-profit and non-profit businesses, nor would it be appropriate for the Commission to treat religious organizations differently from non-religious entities.

⁴⁴ *Atlanta Trunking Associates*, 11 FCC Rcd at 17,195 ¶ 14.

⁴⁵ In considering the payments imposed under 47 C.F.R. § 1.2104(g)(2) on bidders that default after the close of an auction, the Commission has found that "we would contravene Commission policy if we were to reduce default payment obligations based on a bidder's inability to pay, because such a practice would encourage bidders to bid without secure financial backing." *BDPCS Inc.*, *Memorandum Opinion and Order*, 15 FCC Rcd 17,590, 17,611 ¶ 37 (2000).

⁴⁶ Amended Request for Waiver at 2.

15. Finally, we find that the circumstances of this case do not justify a waiver of the interim bid withdrawal payment that Advance has been assessed. Although Advance's final bid withdrawal payment is exceptionally high, this fact alone does not warrant a decision to impose no bid withdrawal payment at all in this case. The Commission's bid withdrawal payment rule has been in place since the inception of the auctions program, and the *Auction No. 37 Procedures Public Notice* clearly explained its application to bidders in Auction No. 37. Advance recognizes that "there should be some consequence as a result of its bid withdrawal,"⁴⁷ and we find that it is important to the Commission's goal of deterring insincere bidding to impose a bid withdrawal payment here. We therefore do not waive the interim bid withdrawal payment of \$205,500 that Advance has been assessed and that has been deducted from its upfront payment for Auction No. 37.

IV. CONCLUSION

16. We conclude that special circumstances warrant a deviation from the normal application of Section 1.2104(g)(1) in this case. If we were to enforce the final bid withdrawal payment assessed against Advance under the rule for its withdrawal of its high bid on the Yarnell, Arizona, construction permit, it would be the highest bid withdrawal payment ever imposed in the history of the auctions program.⁴⁸ More important, it would be the only bid withdrawal payment ever imposed that both exceeds \$4 million and represents more than 200 percent of the sale price of the permit or license. Given the exceptionally high level of this bid withdrawal payment, we conclude that it is higher than necessary to serve the bid withdrawal payment rule's purpose of deterring insincere bidding in Commission auctions. We therefore waive that part of Section 1.2104(g)(1) that prescribes the final bid withdrawal payment and apply to Advance in this case only that part of the rule that prescribes the interim bid withdrawal payment. Because Advance's interim payment of \$205,500 has already been deducted from the upfront payment it deposited with the Commission to participate in Auction No. 37, it owes no further payment to the Commission.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), and Sections 1.3 and 1.1204(g)(1) of the Commission's rules, 47 C.F.R. §§ 1.3 and 1.1204(g)(1), that the Request for Waiver filed by Advance Acquisitions, Inc., on November 20, 2006, IS GRANTED, and the Amended Request for Waiver filed by Advance Acquisitions, Inc., on May 22, 2007, IS GRANTED IN PART.

18. IT IS FURTHER ORDERED pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), and Section 1.1204(g)(1) of the Commission's rules, 47 C.F.R. § 1.1204(g)(1), that the interim bid withdrawal payment of \$205,500 Advance Acquisitions, Inc., has paid for the withdrawal of its provisionally winning bid on the Yarnell, Arizona, construction permit in Round 52 of Auction No. 37 shall be retained by the Commission.

⁴⁷ Request for Waiver at 10. Advance also states in its Amended Request for Waiver: "Advance understood at the time [of withdrawing its bid] that it might be responsible for remitting a bid withdrawal payment to the Commission as a result of its actions if the Arizona Allotment ultimately sold for an amount below Advance's withdrawn bid." Amended Request for Waiver at 15.

⁴⁸ As explained above, a higher bid withdrawal payment was assessed against Voicestream for a bid withdrawn in Auction No. 35, but that bid withdrawal payment was waived for reasons unrelated to the amount of the payment. In addition, in certain early bid withdrawal cases involving typographical errors, bid withdrawal payments higher than that assessed against Advance might have been imposed, but the Commission established guidelines for reducing bid withdrawal payments in such cases. *See supra* note 40.

19. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Fred B. Campbell, Jr.
Chief, Wireless Telecommunications Bureau