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

In the matter of

Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses

ORDER

Adopted: October 7, 1994; Released: October 7, 1994

By the Deputy Chief, Common Carrier Bureau:

1. Before the Bureau are a number of variously styled requests filed by high bidders for certain licenses in the Interactive Video and Data Service (IVDS). One group of requests essentially seeks a waiver from the Commission that would permit them to delay the payment of their initial down payments on those licenses that were due on August 8, 1994 until a future date. These requests were filed by American Classic Financial Company, Ball Park Souvenirs, Inc., the Broward Times, Inc., Tarik Choudhury, Commercial Realty St. Pete, Inc., Manoranjan Das, Ruth Das, Graceba Total Communications, Inc., Interactive America Corporation, Louisiana Interactive Broadcasting System, Inc., Henry Mayfield, Phoenix Data Communications, Inc., Rapasut International, Inc., James Speights, and Vision TV, Inc. Some of these requests were filed prior to the August 8 down payment deadline while others were filed after that deadline. Some filed multiple requests, EON Corporation and Radio Telecom and Technology, Inc. (RTT) opposed the Petition for Extraordinary Relief filed by Commercial Realty St. Pete, Inc.

2. A second group of high bidders made their initial down payment but requests relief from the requirement of further payments (see joint Petition for Extraordinary Relief of AG Partners, Friends of IVDS, IVDCO LLC, IVDS/RLV Partnership, Infopower International, Nanowave Technologies, New England Mobile Communications, Tele-Link Communications, WCTV Partners, Washington Communications, Wayne Partners, and Zarg Corporation, hereafter "Joint Petitioners"). This group of petitioners also requests that the Commission reduce the amount of interest payments for those high bidders entitled to installment financing, and to either freeze the grant of all IVDS licenses or extend the time for construction of the facilities covered by the license. Graceba Total Communications, Inc. (Graceba), which also made its initial down payment, filed a similar request. We do not address here the petition filed by the Joint Petitioners or by Graceba, but we do address the first group of requests, as well as certain other miscellaneous requests, below.

3. Many in the first group of petitioners argue that their respective financial backers unexpectedly withdrew financial support shortly after the auction, leaving them unable to pay the 10 percent initial down payment by the August 8, 1994 deadline (see, e.g., American Classic, the Broward Times, Louisiana Interactive). Others argue that assertedly late or erroneous winning bidder schedules sent by the FCC's auction contractor prevented them from making their deposit in a timely manner (see, e.g., Tarik Choudhury and Ruth Das).

4. Some in this first group argue that the purported lack of readily available equipment to provide IVDS service justified a delay in the payment deadline (see, e.g., Commercial Realty St. Pete, Inc., Manoranjan Das, Phoenix Data). These petitioners state that there is only one supplier of IVDS equipment, EON Corporation, whose equipment is type accepted by the FCC. They argue, for example, that the public interest would not be served by requiring high bidders to make their down payments until there is some assurance that working technology for IVDS systems exist, until there are at least two type accepted IVDS equipment vendors, and until equipment can be shipped on a timely basis so that the licensee does not forfeit its license for failure to meet the construction requirements in the FCC's Rules.

5. We address first the group of petitions requesting waiver of the requirement for submission of a 10 percent initial down payment. This requirement derives from the Second and Fourth Reports and Orders in PP Docket No. 93-253, 9 FCC Red 2348 (1994) and 9 FCC Red 2330 (1994). There, the Commission noted that high bidders would be required to make a down payment in order to provide assurance that they would be able to attract capital, to discourage default, to assure that such bidders would be able to pay the full amount of their bids, and to ensure payment of the default penalty if default subsequently occurred. See, e.g., Fourth Report and Order at para. 25, Second Report and Order at para. 190. The Commission required payment by auction winners of a down payment equal to 20 percent of their winning bids in five years.

The first IVDS auction was held in Washington, D.C. on July 28-29, 1994.

This request will be dismissed as moot. This applicant ultimately made its initial down payment in a timely manner.

Commercial Realty St. Pete, Inc. filed two pleadings: a "Petition for Extraordinary Relief" and an "Emergency Motion for Stay, Lite Pendente." Both seek essentially the same relief, which is to stay all payment deadlines applicable to the IVDS auction until a later date. The Motion for Stay will be addressed separately.

Type acceptance is a process by which equipment manufacturers demonstrate to the Commission that equipment which is to be used in connection with an FCC issued station license meets certain technical standards designed to promote efficient use of the radio spectrum. See Subpart J of Part 2 of the Commission's Rules. Only type accepted equipment may be used to operate an IVDS system. See 47 C.F.R. Sec. 95.851. To date, the Commission has type accepted IVDS equipment from one manufacturer, EON Corporation.

We note, however, that RTT on September 28, 1994 filed a request for assignment of a grantee identifier to be used in future applications for equipment authorizations. See letter of Peter Tannenwald, counsel to RTT, to Acting Secretary, FCC.

See Petition for Extraordinary Relief of Commercial Realty St. Pete, Inc. at 7-8. Section 95.833 of the Commission's Rules requires IVDS licensees to make their service available to increasing amounts of the population or geographic area in their license area over time. Failure to attain such coverage causes the IVDS license to cancel automatically.

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business days after the close of the auction. Small businesses, as defined by the Commission, were permitted to split their down payments into two parts, each equal to 10 percent of their winning bid. See id. at n.145. In any case, however, a minimum of 10 percent of a bidder's winning bid is due within five business days following the close of bidding.

6. The requests for waiver of the requirement for timely initial down payments by the first group of petitioners are denied. WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). One of the most common reasons offered in support of a waiver was the purported lack of equipment availability. In several instances, the petitioners state that a facsimile letter sent from one high bidder to other high bidders discussing the purported lack of IVDS equipment was responsible for withdrawal of financial backing needed to make their down payments. See, e.g., August 15, 1994 letter from Marilyn Moore, President, Louisiana Interactive Broadcasting System, Inc. to General Counsel; August 18, 1994 letter from Keith Clayborne, President, the Broward Times, Inc. to Secretary, FCC. This facsimile letter was submitted as an attachment to Ms. Moore's letter. The facsimile letter appears to have been authored by Commercial Realty St. Pete, Inc., another winning bidder which did not submit its initial deposit. It states that because IVDS system equipment was purportedly unavailable, winning bidders should jointly petition the FCC to defer the August 8 deadline for initial down payments. See also August 15, 1994 letter from Henry Mayfield to Chief, Special Services Division.

7. The status of IVDS equipment availability, however, is a matter which we believe prudent businessmen would investigate prior to committing thousands or millions of dollars for an IVDS license. The availability of equipment, its cost, and its capabilities are matters which have an important bearing on whether and how much to bid for an IVDS license. Bidders who won IVDS licenses without fully understanding these matters should not be able to shift responsibility for their actions onto the government. Grant of a waiver would do so by allowing them to avoid the financial obligations they willingly undertook when they applied to participate in the auction. The exercise of due diligence prior to participating in an auction is very much in the public interest and we wish to do nothing that would discourage such conduct.

8. Moreover, both RTT and EON Corporation have vigorously disputed allegations of equipment unavailability. RTT, for example, states that it intends to have equipment available for delivery in 1995 and has a strategic alliance with Oki Electric Co. to bring equipment to the market. See Comments of RTT on Petition for Extraordinary Relief at 2. EON also states that one winning bidder has been quoted as saying that it has been talking with large equipment manufacturers and that the bidder expects to contract with one of those firms to develop the hardware technology for it. See EON Opposition to Petition for Emergency Relief at 8-9.

9. Grant of a waiver would also be grossly unfair to those applicants who, notwithstanding the nascent state of IVDS, nonetheless made their initial down payments, for they would be worse off after having complied with the rules. For example, EON Corporation, which was, through affiliates, a successful high bidder on several IVDS licenses and which made substantial initial down payments for those licenses, opposes Commercial Realty St. Pete's emergency motion to stay IVDS payment deadlines. EON states that its substantial financial commitment to IVDS would be at risk if licensing were to be delayed. See EON Opposition to Emergency Motion for Stay at 2.

10. Moreover, contrary to the petitioners' apparent expectations, the purpose of type acceptance is limited: it is intended to minimize the potential for harmful interference and is not intended as a governmental warranty that a particular manufacturer's equipment is commercially acceptable and available in commercial quantities. The fact that only one manufacturer's IVDS equipment was type accepted was a matter of public record before the IVDS auction took place. A prudent bidder would be aware of this and would adjust its bids accordingly. Grant of the requested waiver would shift responsibility for imprudent business practices onto the government rather than on the bidder, where it belongs.

11. The Commission also cannot be responsible for the private business arrangements that an applicant has made to finance its successful bid. If an applicant is unsure of its financing, it seems that the more appropriate course would be to not bid or to not bid in excess of the commitments of which it was reasonably certain. If a single letter sent after the auction has occurred can derail financial commitments...
amounting to many thousands or even millions of dollars, we are concerned whether the bidder was ever a serious, qualified bidder.

12. Grant of the requested waiver is likely to undermine the important public interest goal that only serious, qualified bidders participate in spectrum auctions. As the Commission made clear in para. 192 of the Second Report and Order, a substantial delay between auction and down payment would "subvert our objective of reducing speculative bidding because it would provide financially unqualified bidders with an opportunity to 'shop' a winning bid in an effort to obtain financing for a down payment. This would undermine the integrity of the auction itself." Such "bid shopping" is exactly what several of the petitioners have stated they intend to do if a waiver is granted. Grant of the requested waivers will further encourage such undesirable conduct and lessen the likelihood that in the future, only serious, qualified bidders will participate in Commission-sponsored auctions. See also In re Rule Interpretation and Waiver Requests for the Auction of Ten Nationwide Narrowband Personal Communication Service Licenses, DA 94-765, released July 11, 1994, and Public Notice, IVDS Bidder Alert, released August 5, 1994.

13. The Commission also observed that there was a greater risk of default during the period between the close of the auction and licensing than immediately after the auction because there is a greater risk of a drop in license values. Second Report and Order at para. 190. Grant of a waiver would increase the likelihood that any drop in license values would be borne by the government rather than by bidders. No bidder was forced to bid at the auction, and the government cannot guarantee the financial success of widely differing business plans or prospects. The waiver requests are denied for this reason as well.

14. Also before the Bureau are requests by Emerging Technologies Partners, Georgia Felger, Henry Mayfield and Pueblo Communications to allow them to elect small business status even though the time for amending FCC Form 175 has passed. Section 1.2105 of the Commission's Rules provides that bidders will have a limited opportunity to cure defects in their Form 175 except that failure to sign an application or to make the required certifications may not be corrected. As announced by Public Notice issued July 7, 1994, such corrections were due no later than July 14, 1994. Thus, requests to correct applications in order to elect small business status should have been filed no later than that date.

15. However, it appears that the public interest would be served by waiving the July 14 deadline in this instance and allowing the aforementioned four bidders to elect small business status at this time. The initial Form 175 which was distributed by the Commission to potential bidders contained a misprint that may have misled applicants into believing that there was no need to elect small business status separate from status as a minority or woman owned business. Although the Commission moved to correct this situation both through the issuance of Public Notice on June 17, 1994 and through overnight letters to each applicant who appeared to have been misled, it is not clear that the Commission was able to reach every applicant in sufficient time to allow it to correct possible misimpressions.

16. The benefits of small business status should not be denied due to confusion or misunderstandings which may have been caused by misprints for which the Commission is responsible. Congress made clear its desire to ensure opportunity for these entities in new Section 309(j) of the Communications Act, and no other bidder would be prejudiced by allowing these four winning bidders to elect small business status at this time. Moreover, the misprint has been corrected in subsequent versions of Form 175; therefore this particular problem should not occur again. Accordingly, the request by these four petitioners to elect small business status out of time are granted. The licenses issued to these petitioners, however, will be conditioned upon submission within 30 days after issuance, of a certification by the applicant under penalty of perjury that it qualifies for small business status under the Commission's Rules.

17. Also before the Bureau is a request from Ball Park Souvenirs, Inc. to delay for seven to ten days the submission of certain engineering information which would normally be filed with its Form 574. This request is based upon asserted difficulties in retaining engineering consultants to perform this work on a timely basis. We note that all high bidders at the July 28-29, 1994 auction for IVDS licenses were required to submit Form 574 no later than August 15, 1994. See Public Notice No. 44160 released August 2, 1994. We recognize that there are a limited number of consulting engineers capable of performing such work on short notice. We previously granted, and here confirm, Ball Park's request.

19. IT IS FURTHER ORDERED, that the requests by Emerging Technologies Partners, Georgia Felger, Henry Mayfield and Pueblo Communications to elect small business status out of time ARE GRANTED.

20. IT IS FURTHER ORDERED that, the request of Henry Mayfield to amend his FCC Form 175 from individual applicant to partnership status IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief,
Common Carrier Bureau