

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

In the Matter of Applications of)
)
NEXTBAND COMMUNICATIONS, L.L.C.) FCC File No. 0000000114
)
For Authority to Construct and Operate)
Local Multipoint Distribution Services In)
Multiple Basic Trading Areas)

ORDER ON RECONSIDERATION

Adopted: May 19, 1999

Released: May 19, 1999

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On July 17, 1998, Baker Creek Communications, L.P. (Baker Creek) petitioned the Wireless Telecommunications Bureau (Bureau) to reconsider the grant of forty-one Local Multipoint Distribution Service (LMDS) applications of Nextband Communications, L.L.C. (Nextband).¹ Specifically, Baker Creek contends that Nextband violated the Commission's anti-collusion rules in the LMDS auction.² For the reasons set forth below, we deny the Petition.

II. BACKGROUND

2. The LMDS auction commenced February 18, 1998 and concluded March 25, 1998. Baker Creek was the winning bidder in 232 markets, while Nextband was the winning bidder in forty one markets.³

3. On March 9, 1998, prior to the conclusion of the LMDS auction, Thomas Gutierrez and David LaFuria of the law firm of Lukas, Nace, Gutierrez and Sachs sent the Bureau a letter (Gutierrez Letter) challenging and asking for an immediate ruling on Baker Creek's eligibility for a 45% very small business credit⁴ for the LMDS auction.⁵ The Gutierrez Letter did not state on whose behalf it was sent.

¹ Nextband's LMDS applications were consolidated under File Number 0000000114.

² Baker Creek Communications, L.P. Petition for Reconsideration and Request for Expedited Review or Stay (July 17, 1998) (Petition).

³ *Id.* at 1 n.1, 2.

⁴ *See* 49 C.F.R. §§ 101.1107, 101.1112.

⁵ Letter from Thomas Gutierrez and David LaFuria, Law Firm of Lukas, Nace, Gutierrez and Sachs, to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (FCC) Re: Request for Immediate Ruling On Eligibility for Discount of Baker Creek Communications, L.P., LMDS Auction (dated

The letter ended by saying, "Out of respect for the Commission's anti-collusion rules, we determined not to approach Baker Creek directly, but rather to bring this [matter] to your attention promptly." Despite that statement, the Gutierrez Letter showed that a copy was sent to J. Craven, Esq., a person listed on Baker Creek's short-form application as an associate of Baker Creek's principal; moreover, Craven was the only "cc" listed on the letter.⁶

4. On March 19, 1998, Baker Creek opposed the Gutierrez Letter by asking that such request be summarily denied.⁷ Baker Creek stated that the Gutierrez Letter offered no facts but only allegations, and that under the Commission's rules the proper time for commenting on a party's status as a small business was after the auction was completed.⁸ Baker Creek also stated that by sending a copy of the letter to Craven, the party behind the Gutierrez Letter wanted Baker Creek to be made aware of it, and that the Bureau might want to investigate whether the Gutierrez Letter was intended to influence Baker Creek's bidding by serving as a threat of opposition against Baker Creek's long-form applications should Baker Creek win any licenses.⁹

5. On March 27, 1998, the Bureau's Auctions and Industry Analysis Division denied the request made in the Gutierrez Letter for an immediate ruling on Baker Creek's very small business status.¹⁰ The Auctions and Industry Analysis Division stated that absent substantiated evidence of wrongdoing, the allegations in the letter were more properly raised after the auction's winning bidders had filed their long-form applications.¹¹

6. As winning bidders in the LMDS auction, Baker Creek and Nextband timely filed their long-form applications which were accepted for filing on April 16, 1998.¹² Nextband filed a Petition to Deny against Baker Creek's applications on May 18, 1998, the last day on which Petitions to Deny could be filed. Nextband made arguments similar to those raised in the Gutierrez Letter that Baker Creek was not

Mar. 9, 1998) (Gutierrez Letter).

⁶ *Id.* at 5.

⁷ Letter from Leonard J. Kennedy, Counsel for Baker Creek Communications, L.P. to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC Re: Request for Immediate Ruling On Eligibility for Discount of Baker Creek Communications, L.P., LMDS Auction (dated Mar. 19, 1998).

⁸ *Id.*

⁹ *Id.*

¹⁰ Letter to Thomas Gutierrez, Law Firm of Lukas, Nace, Gutierrez and Sachs, from Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (dated Mar. 27, 1998).

¹¹ *Id.*

¹² *Public Notice*, Local Multipoint Distribution Service Applications Accepted for Filing, Auction # 17, DA 98-740, 13 FCC Rcd 10947 (1998).

eligible for the 45% very small business credit.¹³ On June 17, 1998, the Bureau's Public Safety and Private Wireless Division conditionally granted Nextband's LMDS license applications.¹⁴ Baker Creek filed a petition for reconsideration regarding the granting of the licenses on July 17, 1998.¹⁵ Baker Creek argues that Nextband may have been responsible for the filing of the Gutierrez Letter. Baker Creek claims that by sending a copy of the letter to J. Craven, an associate of Baker Creek's principal, the party behind the Gutierrez Letter obviously wanted Baker Creek to be made aware of it. Therefore, Baker Creek argues, the purpose of the Gutierrez Letter may have been to intimidate Baker Creek or otherwise influence its bidding, and that if Nextband was involved in sending the letter, Nextband thereby violated the Commission's anti-collusion rules. Baker Creek asks the Bureau to investigate and rescind or otherwise sanction Nextband if the allegations are true.¹⁶ Baker Creek states that it is raising this argument for the first time in a petition for reconsideration because it did not know that Nextband may have been the party responsible for the Gutierrez Letter until Nextband filed its Petition to Deny against Baker Creek, on the last day petitions to deny could be filed.¹⁷

III. DISCUSSION

7. Before we address the merits of Baker Creek's petition, we must determine if it satisfies the Commission's procedural requirements. To file a request for reconsideration, a person must either be a party to the proceeding or be one whose interests are adversely affected by the action in question, in which case it shall show why it was not possible to participate in the proceeding earlier.¹⁸ Baker Creek did not file a petition to deny against Nextband's applications. Thus, Baker Creek's status as a party to this proceeding is not established by its prior participation herein.¹⁹ We find, however, that Baker Creek is a person whose interests are adversely affected by a Commission action. As a participant in the LMDS auction that competed against Nextband for at least some of the licenses at issue, Baker Creek's interests

¹³ Nextband Petition to Dismiss or Deny on in the Alternative to Institute an Inquiry (filed May 18, 1998). See also Baker Creek Communications, L.P., For Authority to Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas, *Memorandum Opinion and Order*, 13 FCC Rcd 18709 (PSPWD 1998) (granting petition in part; finding that Baker Creek was not eligible for bidding credit; and conditionally granting Baker Creek's licenses).

¹⁴ See *Public Notice*, FCC Announces the Conditional Grant of 199 Local Multipoint Distribution Service Licenses, Auction Event No. 17, DA 98-1169 (released June 17, 1998).

¹⁵ Baker Creek Petition. Nextband filed an Opposition to Baker Creek's petition on July 30, 1998, and Baker Creek filed a Reply on August 10, 1998.

¹⁶ Baker Creek Petition at 2.

¹⁷ *Id.* at 4.

¹⁸ 47 C.F.R. § 1.106(b).

¹⁹ San Luis Obispo Limited Partnership, *Memorandum Opinion and Order and Forfeiture Order*, 11 FCC Rcd 9616, 9617 (1996).

are adversely affected by the granting of Nextband's licenses. We conclude therefore that it has standing to complain of the grant of the licenses.²⁰

8. Baker Creek also has shown why it did not participate in the proceeding earlier (*i.e.*, did not file a petition to deny against Nextband). Baker Creek states that it did not learn that Nextband may have violated the Commission's prohibition against collusion until after the deadline for filing petitions to deny had passed, when Baker Creek received Nextband's petition to deny against Baker Creek's LMDS applications repeating the allegations made in the Gutierrez Letter.²¹ We agree that there is little Baker Creek could have done before then to determine on whose behalf the Gutierrez Letter was sent. For example, a review of the LMDS short-form applications shows that the law firm of Lukas, Nace, Gutierrez and Sachs served as the contact person for a number of participants in the LMDS auction.²² Moreover, the contact person listed by Nextband was not someone at the Lukas, Nace, Gutierrez and Sachs law firm. Thus, a review of the LMDS short-form applications would not have been informative as to whom Baker Creek should complain nor would it have caused Baker Creek to direct such a complaint to Nextband. Further, while presumably Nextband and Mr. Gutierrez know whether Nextband is the party on whose behalf the Gutierrez Letter was sent, Nextband has neither confirmed nor denied that the letter was sent on its behalf and Mr. Gutierrez has not stated on whose behalf he sent the letter. Accordingly, we find that Baker Creek has adequately explained why it was not possible to participate in this proceeding earlier and we will consider Baker Creeks' request for reconsideration on the merits.

9. Baker Creek asks that the Division reconsider the grant of licenses to Nextband, *i.e.*, that it deny Nextband's license applications. Section 309(d) of the Communications Act of 1934, as amended, requires parties filing petitions to deny license applications to present allegations that, if true, would be *prima facie* inconsistent with the public interest, convenience and necessity.²³ The petitioner bears the burden of pleading sufficient facts to establish a *prima facie* case and these facts must be supported by an affidavit from persons with personal knowledge.²⁴ Allegations that are conclusory or based simply on belief are not sufficient to pass this test.²⁵ As discussed herein, we will apply these standards to Baker Creek's Petition.²⁶

²⁰ Cf. Baker Creek Communications, L.P., *Memorandum Opinion and Order*, 13 FCC Rcd 18709, 18710 n.1 (1998) (Nextband, as a participant in the LMDS auction eligible to bid on markets won by Baker Creek, had standing to file petition to deny against Baker Creek).

²¹ Baker Creek Petition at 4.

²² The LMDS short-form applications were available to the general public in the Bureau's reference room and were also available on-line to participants in the LMDS auction through the auction bidding software.

²³ See 47 U.S.C. § 309(d).

²⁴ See 47 U.S.C. § 309(d)(2); 47 C.F.R. § 1.2108(b).

²⁵ See Mercury PCS II, LLC For Facilities in the Broadband Personal Communications Systems in the D, E, and F Blocks, *Notice of Apparent Liability for Forfeiture (Mercury PCS II, LLC)*, 12 FCC Rcd 17970, 18100 (1997) (citing *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 n.11 (D.C. Cir. 1987)).

²⁶ WWOR-TV, Inc., *Memorandum Opinion & Order*, 6 FCC Rcd 6569, 6570 n.7 (1991); KRPL, Inc., *Letter*, 5 FCC Rcd 2823, 2824 (1990); see also Univision Holdings, Inc., *Memorandum Opinion & Order*, 8 FCC Rcd 3931, 3931 (1993).

10. Based upon our review of the record in this proceeding, we find that Baker Creek has failed to make a *prima facie* showing that grant of the subject applications to Nextband is inconsistent with the public interest, convenience and necessity. In this connection, we note that Baker Creek has offered nothing but supposition to support its Petition. Baker Creek argues that Nextband *might* be responsible for sending a letter to the Commission during the LMDS auction challenging Baker Creek's eligibility for small business credits. Further, it contends that because a copy of the letter was sent to one of Baker Creek's associates, the purpose of the letter *might* have been to intimidate it and affect its bidding (Baker Creek claims that the letter was sent at a "critical stage" of the auction).²⁷ Baker Creek then posits that *if* Nextband was involved, its actions constitute a clear and willful violation of the Commission's Rules prohibiting collusion and the Commission should determine whether that action warrants further investigation and sanctions.²⁸ The only supporting facts presented in the Petition are that the lawyers who sent the Gutierrez Letter also represent Nextband and that the allegations raised in the Gutierrez Letter are the same as those raised in the Petition to Deny Nextband filed against Baker Creek.²⁹ As to the first point, as stated above, the Lukas, Nace, Gutierrez and Sachs law firm represented at least a dozen other participants in the LMDS auction. As a result, it is at least plausible that the Gutierrez Letter was written on behalf of another LMDS auction participant, and Baker Creek has not presented evidence to the contrary. As to the second point, it was well known at the time of the LMDS auction that the Bureau would be scrutinizing bidders' eligibility for small business credits. Thus, we are not persuaded that the fact that both the Gutierrez Letter and Nextband's petition to deny raised this issue necessarily indicates that Nextband was the entity on whose behalf the letter was submitted. Thus, we conclude that Baker Creek's lack of substantiation of its charge against Nextband requires dismissal of its Petition.

11. In addition, we find that the sending of the Gutierrez Letter did not violate Section 1.2105(c) of the Commission's Rules.³⁰ As a general matter, Section 1.2105(c) prohibits competing bidders from discussing or otherwise communicating the substance of their bids or bidding strategies once they have filed their short-form (FCC Form 175) applications.³¹ Baker Creek has not demonstrated that the Gutierrez Letter did so. As Baker Creek states, at the time it received a copy of the Gutierrez Letter, it did not know on whose behalf the letter was sent.³² Therefore, assuming that the Gutierrez Letter was, in fact, sent on behalf of Nextband, the letter could not have been an attempt on Nextband's part at reaching an agreement as to bidding with Baker Creek because Baker Creek did not know against whom it should forebear bidding in order to reach an accommodation. Nor did the Gutierrez Letter offer Baker Creek a *quid pro quo* for Baker Creek had nothing to gain by conceding to what it claims was the letter's implicit threat. Finally, the Gutierrez Letter did not communicate the substance of the sender's bids or

²⁷ Baker Creek Petition at 4.

²⁸ *Id.* at 2 (emphasis added).

²⁹ *Id.* at 2, 5.

³⁰ 47 C.F.R. § 1.2105(c).

³¹ 47 C.F.R. § 1.2105(c)(1) states that, except as otherwise provided, "after the filing of short-form applications, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder makes the required down payment"

³² Baker Creek did not suspect Nextband until Nextband filed its Petition to Deny against Baker Creek, and it still is not certain that Nextband is responsible. *See* Petition at 2, 4-5.

bidding strategy. Baker Creek has failed to demonstrate how the sending of the letter related any information regarding the sender's bidding intentions.³³ We therefore find that the sending of the letter was not an attempt at collusion on behalf of the sender and did not violate Section 1.2105(c) of the Commission's Rules.

IV. ORDERING CLAUSES

12. ACCORDINGLY, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i) and 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration of Baker Creek Communications, L.P. filed on July 17, 1998, IS DISMISSED.

13. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

³³ See *Mercury PCS II, LLC*, 12 FCC Rcd at 17978.