

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

In the Matter of
Entertainment Unlimited, Inc.
Request for Refund of Late Payment
Fees for PCS Licenses Purchased in
Auction No. 22

Memorandum Opinion and Order

Adopted: May 4, 2001

Released: May 9, 2001

By the Commission:

I. INTRODUCTION

1. The Commission has under consideration an Application for Review filed by Entertainment Unlimited, Inc. ("EU"). EU seeks review of the Wireless Telecommunications Bureau's ("Bureau") Order on Reconsideration, which denied EU's Petition for Reconsideration in the above-captioned proceeding. In the Order on Reconsideration, the Bureau rejected EU's challenge of Commission procedures for refunding excess upfront payments. The Bureau also denied EU's request for refund of late payment fees and associated interest assessed against EU for failure to make timely payment on two broadband PCS licenses purchased in Auction No. 22. In its Application for Review, EU seeks reversal of the Bureau's Order on Reconsideration and a refund of the late payment fees and applicable interest. For the reasons discussed below, we deny EU's Application for Review and affirm the Bureau's decision.

II. BACKGROUND

2. Prior to the commencement of Auction No. 22, the Commission received an upfront payment for EU of \$2,300,000. This payment was accompanied by an FCC Remittance Advice Form (FCC Form 159) designating Raveesh K. Kumra ("Mr. Kumra") as the "Payer" and EU as the "Applicant." Auction No. 22 closed on April 15, 1999. EU was the winning bidder on two C block

1 Application for Review Requesting Refund of Late Payment Fees for PCS Licenses Purchased in Auction No. 22, filed by Stephen Kaffee, counsel for Entertainment Unlimited, Inc., on August 3, 2000 ("Application for Review").

2 In the Matter of Entertainment Unlimited, Inc. Request for Refund of Late Payment Fees for PCS Licenses Purchased in Auction No. 22, Order on Reconsideration, 15 FCC Rcd 11581 (WTB) (2000) ("Order on Reconsideration").

3 Id.

4 Id.

5 See generally Application for Review.

6 FCC Form 159 is submitted to the Commission with virtually all auctions-related payments.

licenses.⁷ EU owed a down payment for these licenses of \$522,750, which the Commission deducted from EU's upfront payment, leaving an excess upfront payment amount of \$1,777,250.

3. On April 20, 1999, the Auctions and Industry Analysis Division ("Division") released a *Public Notice* announcing the closing of Auction No. 22.⁸ That *Public Notice* made the following statement concerning refunds of excess upfront payments:

Upfront monies on deposit which are in excess of the required down payment, withdrawal and/or default payment amounts will be refunded to the *payor of record* promptly upon receipt of the necessary wire transfer instructions.⁹

4. On May 27, 1999, having received no instructions on how to refund the excess upfront payment amount of \$1,777,250, Commission staff contacted Mr. Kumra, the "Payer" listed on FCC Form 159.¹⁰ Mr. Kumra directed the Commission to refund the excess upfront payment to his account.¹¹ Accordingly, on May 28, 1999, the Commission wire transferred to Mr. Kumra the excess upfront payment amount of \$1,777,250.¹²

5. The deadline for making final payments on the two C block licenses for which EU was the winning bidder was June 25, 1999.¹³ The total amount owed for these licenses was \$2,613,750.¹⁴ EU missed the final payment deadline and, instead, made full payment on these licenses, along with a five percent late fee of \$104,550, on July 9, 1999, as permitted by section 1.2109(a) of our rules.¹⁵

6. On August 6, 1999, EU filed a request for refund of the \$104,550 late fee.¹⁶ In its request, EU argued that the Commission was responsible for EU's failure to meet the final payment deadline.¹⁷ EU claimed that the Commission's refund of the excess upfront payment amount of \$1,777,250 to Mr. Kumra, the "Payer" listed on FCC Form 159, rather than to EU, the applicant, left EU with insufficient funds to make timely payment on the C block licenses.¹⁸ The Division denied EU's Refund Request, concluding that it acted consistent with its procedures in refunding the \$1,777,250 excess upfront payment to Mr. Kumra.¹⁹ The Division affirmed that the Commission's policy is to make

⁷ The two C block licenses won by EU were in the Visalia-Porterville-Hanford, CA and Bakersfield, CA Basic Trading Areas. "C, D, E and F Block Broadband PCS License Auction Closes," *Public Notice*, 14 FCC Rcd 6688 (1999) ("*Closing PN*").

⁸ *Closing PN*, 14 FCC Rcd 6688.

⁹ *Closing PN*, 14 FCC Rcd at 6692 (emphasis added).

¹⁰ *Order on Reconsideration*, 15 FCC Rcd at 11582, ¶ 3.

¹¹ *Id.*

¹² *Id.*

¹³ See "Wireless Telecommunications Bureau Announces It Is Prepared to Grant 161 C, E, & F Block Broadband PCS Licenses," *Public Notice*, DA 99-1156 (rel. June 11, 1999).

¹⁴ *Id.*

¹⁵ 47 C.F.R. § 1.2109(a).

¹⁶ Request for Refund of Late Payment Fee for PCS Licenses Purchased at Auction No. 22, filed by Stephen Kaffee, counsel for Entertainment Unlimited, Inc., on August 6, 1999 ("*Refund Request*").

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *In the Matter of Entertainment Unlimited, Inc., Request for Refund of Late Payment Fees for PCS Licenses Purchased in Auction No. 22*, *Order*, 14 FCC Rcd 19551 (1999) (A&IAD) ("*Order*").

refunds of excess upfront payments to the “payor of record.”²⁰ The Division further determined that the “payor of record” is not the “Contact Person” designated on an applicant’s FCC Form 175, as EU argued, but is the individual or entity identified on the FCC Form 159 as the “Payer,” in this case, Mr. Kumra.²¹ The Division noted that the “Contact Person” is the individual to whom registration information and questions concerning an applicant’s Form 175 are directed.²²

7. On December 22, 1999, EU filed a Petition for Reconsideration of the Division’s Order.²³ EU argued, as it did in its Refund Request, that the Commission failed to comply with the proper procedures for refunding excess upfront payments as stated in the above-referenced *Public Notice* for Auction No. 22, and requested a refund of its late payment fees and associated interest.²⁴ EU noted that the term used on FCC Form 159 is “Payer,” not “payor,” as in the phrase “payor of record” in the *Public Notice*.²⁵ Based on this spelling discrepancy, EU argued that the “payor of record” was not the individual identified on the FCC Form 159, but rather the “Contact Person” identified on FCC Form 175.²⁶ The Bureau rejected such arguments as unfounded and confirmed that the “payor of record” is the “Payer” identified on FCC Form 159.²⁷ Accordingly, the Bureau denied EU’s Petition for Reconsideration and affirmed the Division’s decision.²⁸

8. Subsequently, on August 3, 2000, EU filed an Application for Review of the Bureau’s denial of its Petition for Reconsideration.²⁹ EU maintains that the Commission mishandled the excess upfront payment and requests a refund of \$104,550 in late payment fees and associated interest assessed in connection with EU’s purchase of two broadband PCS licenses in Auction No. 22.³⁰

III. DISCUSSION

9. In its Application for Review, EU claims that the Commission failed to follow proper procedures for refunding excess upfront payments. Specifically, EU contends that the Division and Bureau: (1) erred in concluding that the “payor of record” is Mr. Kumra, the person who transmitted the funds to the Commission, rather than the bidder; (2) erred in failing to seek instructions from the “Contact Person” identified on EU’s short-form application regarding the refund of payment; and (3) erred in taking affirmative measures to refund the upfront payment within 45 days after the conclusion of Auction No. 22.³¹ EU maintains that these errors prevented it from making timely payment on two C block licenses and argues that it is, therefore, entitled to a refund of the late fees and associated interest assessed

²⁰ *Id.* at 19553-54, ¶ 7.

²¹ *Id.*

²² *Id.*

²³ Petition of Entertainment Unlimited, Inc. for Reconsideration of Order Denying Its Request for Refund of Late Fee, filed by Stephen Kaffee, counsel for Entertainment Unlimited, Inc., on December 22, 1999 (“Petition”).

²⁴ *See Order on Reconsideration*, 15 FCC Rcd 11581.

²⁵ *Id.* at 11585, ¶9.

²⁶ *Id.* EU has not raised this argument in its Application for Review. *See* Application for Review.

²⁷ *See Order on Reconsideration*, 15 FCC Rcd at 11585-86, ¶¶ 9-10.

²⁸ *See Order on Reconsideration*, 15 FCC Rcd 11581.

²⁹ Application for Review at 1.

³⁰ *Id.* We note that EU does not request a refund of the total excess upfront payment of \$1,777,250 that was refunded to Mr. Kumra. EU only requests a refund of \$104, 550 in late payment fees and associated interest.

³¹ Application for Review at 2.

against it.³²

10. EU argues that Commission staff should have obtained instructions regarding refund of the excess upfront payment from Mr. Dave Pruett, EU's "Contact Person," as designated on its short-form application (FCC Form 175), rather than Mr. Kumra, the "Payer," as indicated on FCC Form 159.³³ To support this contention, EU points to general language in the FCC Form 175 describing the role of the "Contact Person."³⁴ We find EU's reliance on such language inapposite. The Auction No. 22 *Closing PN* clearly identified the "payor of record" as the party designated to receive refunds of excess upfront payments.³⁵ We reject EU's attempt to infer that the "Contact Person" is the individual with whom communications must be made regarding the refund of upfront payments where the Commission has so clearly identified the "payor of record" as the recipient for such payments.³⁶ EU's efforts to contradict our explicit instructions on this matter by reference to language unrelated to the refund of payments are unavailing. The language addressing refunds in the Auction No. 22 *Closing PN* contains no reference to the "Contact Person" because, as the language makes clear, the Commission intends to return payments only to the "payor of record," unless the "payor of record" instructs otherwise.³⁷ Both the Division and the Bureau have correctly concluded that the "payor of record" is the "Payer" identified on Form 159.³⁸ EU has not cited any Commission precedent in any of its underlying pleadings to demonstrate that the Commission regards the "payor of record" as any one other than the "Payer."³⁹ While EU makes unsubstantiated claims concerning the identity of the "payor of record," EU presents no evidence of prior Commission statements or practices to support its contention that "payor of record" is someone different than the "Payer."⁴⁰

11. EU also contends that the Bureau failed to consider evidence of ownership in finding that Mr. Kumra, and not EU, is the "payor of record."⁴¹ EU explains that although Mr. Kumra was identified as the "Payer" when the upfront payment was made, EU is the "owner" of the upfront deposit.⁴² For this reason, EU asserts that the Commission should have treated EU as the "payor of record" and refunded any excess upfront payment to EU.⁴³ In support of its arguments, EU points to the following language in the Division's *Order*:

Ordinarily, bidders contact the Commission shortly after an auction closes to request a refund of their deposits or to direct that such deposits be applied to the balances owed the Commission.⁴⁴

³² See Application for Review at 2.

³³ *Id.* at 7-8.

³⁴ *Id.* at 7.

³⁵ *Closing PN*, 14 FCC Rcd at 6692.

³⁶ See *Id.*

³⁷ *Id.*

³⁸ See *Order* at 14 FCC Rcd at 19554, ¶ 7 and *Order on Reconsideration* at 15 FCC Rcd at 11584-85, ¶¶ 8-9.

³⁹ See Refund Request and Petition.

⁴⁰ See Application for Review.

⁴¹ Application for Review at 6.

⁴² See Application for Review at 5-7.

⁴³ *Id.*

⁴⁴ Application for Review at 5 (citing *Order*, 14 FCC Rcd at 19554, ¶8).

EU argues that this statement is inconsistent with the language contained in the Auction No. 22 *Closing Public Notice* because it refers to “bidders” rather than to “payors.”⁴⁵ Based on this excerpt, EU contends that the Division does, in fact, accept instructions from bidders regarding the disposition of excess upfront payments.⁴⁶ EU is incorrect. The Commission does not accept instructions regarding the refund of excess upfront payments from entities or individuals other than the “Payer” identified on FCC Form 159. The Division made the above-referenced statement in an effort to contrast EU’s behavior with that of other bidders. EU, by its own admission, did not contact the Commission concerning the refund of the upfront payment.⁴⁷ The Division, therefore, merely observed that while other bidders often contact the Commission concerning excess upfront payments shortly after an auction closes, EU was silent.⁴⁸ Had EU contacted the Commission and requested that the upfront payment be returned to someone other than the “Payer” identified on Form 159, the Commission would not have heeded such instructions and would have informed EU that the Commission could only accept refund instructions from the “payor of record” as clearly stated in the Auction No. 22 *Closing PN*.

12. We agree with the Bureau that the delay in payment for which EU was assessed \$104,550 in late fees was not caused by Commission error or a violation of Commission policy but was the consequence of EU’s own internal communication problems.⁴⁹ In this instance, the “Payer” and the bidder apparently disagreed over the disposition of the excess upfront payment. The Commission does not involve itself in the private arrangements that may exist between “Payers” and bidders in returning excess funds on deposit, nor is it under any obligation to conduct investigations or make inquiries concerning the relationships between such parties where the “Payer” is clearly identified on the FCC Form 159. Commission procedures merely require us to refund excess upfront payments to the “payor of record,” whom we have consistently regarded as the “Payer” on FCC Form 159. In making refunds of excess upfront payments, the Commission simply reverses the flow of money by returning the excess payment to the individual or entity that paid, that is the “Payer.” The Commission has consistently adhered to this policy in the past and EU presents no evidence to the contrary.

13. Finally, we note that Commission staff sought to process the excess upfront payment in a manner consistent with the intent expressed by Congress in section 309(j)(8)(C) of the Communications Act.⁵⁰ As the Bureau correctly determined, seeking instructions from the “payor of record” was a reasonable means of accomplishing this objective.⁵¹ EU argues that the Commission never adopted a rule or issued a Public Notice that informed bidders of the way it intended to implement its understanding of Congress’ intent with respect to excess deposits of winning bidders.⁵² EU is incorrect. In the Auction No. 22 *Closing PN*, the Commission stated that excess upfront deposits would be refunded to the “payor of record promptly upon receipt of the necessary wire transfer instructions.”⁵³ This language clearly indicates the point at which the Commission will refund excess monies - upon receipt of instructions. As the Bureau noted, this language does not dictate who must contact whom first regarding the

⁴⁵ Application for Review at 5.

⁴⁶ Application for Review at 5-7.

⁴⁷ Petition at 3.

⁴⁸ *Order*, 14 FCC Rcd at 19554, ¶ 8.

⁴⁹ *Order on Reconsideration*, 15 FCC Fcd at 11586, ¶ 11.

⁵⁰ 47 U.S.C. § 309(j)(8)(C) (the Commission has 45 days following the conclusion of an auction to either transfer the deposits of successful bidders to the Treasury or return the deposits of unsuccessful bidders to such bidders).

⁵¹ *Order on Reconsideration*, 15 FCC Rcd at 11586-87, ¶ 12.

⁵² See Application for Review at 9.

⁵³ *Closing PN*, 14 FCC Rcd at 6692.

communication of wire transfer instructions.⁵⁴ The Commission may, consistent with the referenced language, take affirmative action to contact the “payor of record” concerning the disposition of excess monies. Moreover, such action was not contrary to the objective of section 309(j)(8)(C) concerning the timely transfer of deposits to the Federal Treasury.⁵⁵

14. We conclude that the Bureau appropriately denied EU’s request for a refund of the \$104,550 in late payment fees and associated interest assessed against it for failure to make timely payment on two licenses purchased in Auction No. 22.⁵⁶ Accordingly, for the reasons discussed above, we deny the Application for Review and affirm the Bureau’s denial of EU’s Petition for Reconsideration.

IV. ORDERING CLAUSE

15. IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and 47 C.F.R. § 1.115, EU’s Application for Review filed on August 3, 2000 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁵⁴ See *Order on Reconsideration*, 15 FCC Rcd at 11583-84, ¶ 7.

⁵⁵ See 47 U.S.C. § 309(j)(8)(C).

⁵⁶ See *Order on Reconsideration*, 15 FCC Rcd at 11587, ¶ 13.