

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of)
)
PCS 2000, L.P.,)
Request for Waiver of)
Section 24.704(a)(1))
of the Commission's Rules)
)
PCS 2000, L. P.,)
Bid Withdrawal Payment)
for License B332)
(Omaha, Nebraska))

ORDER

Adopted: December 19, 1996

Released: December 20, 1996

By The Chief, Wireless Telecommunications Bureau:

1. The Wireless Telecommunications Bureau ("Bureau") has before it a request for waiver¹ of Section 24.704(a)(1) of the Commission's rules² filed by PCS 2000, L.P. ("PCS

¹ PCS 2000, L.P., "Request for Expedited Waiver or Reduction of Withdrawal Penalty" (filed January 25, 1996) ("Request for Waiver"); PCS 2000, L.P., "Amended Request for Expedited Waiver or Reduction of Withdrawal Penalty" (filed February 21, 1996) ("Amended Request for Waiver").

² Section 24.704(a)(1) of the Commission's rules provides that:

[a] bidder who withdraws a high bid during the course of the auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

47 C.F.R. § 24.704(a)(1).

2000"). By this Order, we hereby resolve PCS 2000's request. Specifically, this Order reduces PCS 2000's bid withdrawal payment for License B324 (Norfolk, Virginia) to two times the minimum bid increment for that license for Round 11 of the broadband Personal Communications Services ("PCS") C Block auction, or \$3,273,374. In addition, this Order assesses a bid withdrawal payment of \$1,257,771 for License B332 (Omaha, Nebraska) from the broadband PCS C block auction, which PCS 2000 has not contested.

2. *Background.* On January 23, 1996, in Round 11 of the broadband PCS C Block auction, PCS 2000 submitted a bid of \$180,060,000 for License B324 (Norfolk, Virginia). Following the Commission's release of bidding results for Round 11 to the public, one of PCS 2000's representatives telephoned Commission auction staff to report that its recorded bid for License B324 was incorrect. Specifically, he indicated that it was ten times PCS 2000's intended bid of \$18,006,000. In Round 12, PCS 2000 withdrew its bid for the license. On January 26, 1996, PCS 2000 filed with the Commission a "Request for Expedited Waiver or Reduction of the Withdrawal Penalty."³ On February 21, 1996, PCS 2000 amended its Request for Waiver, citing the discovery of new information relating to the submission of its Round 11 bid.⁴ On May 6, 1996, the Commission completed the broadband PCS C Block auction.⁵

3. The Commission recently addressed the partial waiver of the bid withdrawal provisions in the context of the 900 MHz Specialized Mobile Radio ("SMR") and broadband PCS C Block auctions.⁶ The Commission's Order resolved the waiver requests of several applicants who submitted erroneous bids which were later withdrawn. The Order also delegated authority to the Bureau to resolve requests for waiver of the bid withdrawal provisions involving similar factual circumstances.⁷ The Order indicated that for a party to be eligible for such a waiver, it must submit a request for waiver demonstrating that the bid in question was submitted in error.⁸ The waiver request also must be accompanied by a sworn declaration attesting to the veracity of the factual circumstances surrounding the erroneous bid

³ See Request for Waiver.

⁴ See Amended Request for Waiver.

⁵ PCS 2000 also withdrew a bid for License B332 (Omaha, Nebraska) during the PCS C Block auction. Pursuant to Section 24.704(a)(1) of the Commission's rules, the withdrawal payment for this bid is \$1,257,711. See 47 C.F.R. § 24.704(a)(1). PCS 2000 has not contested this bid withdrawal payment.

⁶ See Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, *Order*, FCC 96-203 (rel. May 3, 1996) ("*May 3 Order*"), Petitions for recon. pending. See also Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision, *Order*, DA 96-706 (May 6, 1996), Application for Review pending.

⁷ *May 3 Order* at ¶ 15.

⁸ *Id.* at ¶ 26.

submission.⁹ In addition, the Bureau was directed to consider such requests on a case-by-case basis.¹⁰

4. *PCS 2000's Request.* In its Request for Waiver, PCS 2000 stated that it erroneously had submitted a bid for License B324 in Round 11 of the auction which was ten times higher than it intended.¹¹ PCS 2000 argued that a waiver or reduction of the bid withdrawal payment was justified because the imposition of the full bid withdrawal payment amount would not serve the public interest.¹² PCS 2000 further argued that grant of its waiver request would not undermine the purpose of Section 24.704 of the Commission's rules because it had presented unique circumstances.¹³ In support of its Request for Waiver, PCS 2000 argued that its authorized bidding agent immediately contacted Commission auction staff by telephone upon learning of the erroneous bid, and withdrew the bid the following day in Round 12 of the auction.¹⁴ In addition, PCS 2000 alleged that "[t]he error appears to have occurred in PCS 2000's bid preparation and submission process and was likely caused by some combination of a departure from previously established internal procedures, human error, and the inability to conduct a complete cross-check of the submitted bids against other data prior to the conclusion of the bidding period because of a lack of time. In addition, discovery of the error was delayed because the FCC's confirmation of the bid was not received due to a print server malfunction."¹⁵ PCS 2000 further noted that the results reported by the FCC did not reflect the bid that PCS 2000 believed it had submitted, and that its authorized bidding agent supplied the FCC with copies of spreadsheet printouts indicating the bids that PCS 2000 believed it had submitted.¹⁶

5. On February 7, 1996, the Bureau requested additional information from PCS 2000

⁹ *Id.* at ¶ 21.

¹⁰ *Id.*

¹¹ PCS 2000 has accepted responsibility for the error and does not attribute such error to the Commission. Request for Waiver at 2.

¹² *Id.* at 2-3

¹³ *Id.*

¹⁴ PCS 2000 also stated that immediately upon informing Commission auction staff of the erroneous bid, it forwarded "copies of spreadsheet printouts indicating the bids that PCS 2000 believed it had submitted." Request for Waiver at 3.

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 2-3.

regarding the circumstances surrounding the submission of the allegedly erroneous bid.¹⁷ On February 14, 1996, PCS 2000 filed a "Progress Report"¹⁸ responding to the Bureau's inquiry. Among other things, PCS 2000 stated that on February 6, 1996, "for the first time [PCS 2000] received information calling into question the representations made in the January 26 waiver request."¹⁹ In response to this new information, PCS 2000 stated that it retained independent counsel to investigate the factual discrepancies surrounding the bid submission and to help provide further answers to the Bureau's February 7, 1996 request for additional information.²⁰

6. On February 21, 1996, PCS 2000 filed the subject Amended Request for Waiver seeking elimination or reduction of the required bid withdrawal payment. On that date, PCS 2000 also filed a Declaration of Javier O. Lamoso, President of Unicom Corporation, PCS 2000's sole general partner, in response to the Bureau's February 7, 1996 letter regarding PCS 2000's submission of the allegedly erroneous bid.²¹ In the Declaration, Mr. Lamoso states that while "the submission of a \$180,060,000 bid on behalf of PCS 2000 for the Norfolk market was the result of an innocent, inadvertent error, [i]t now appears, however, that certain other statements contained in the waiver request were not entirely accurate."²² Mr. Lamoso notes that the Amended Request for Waiver is being filed to set the record straight.²³ In particular, the Amended Request for Waiver deletes statements made in the Request for Waiver that the results reported by the FCC did not reflect the bid that PCS 2000 believed it had submitted, as well as the reference to copies of spreadsheet printouts provided to the FCC indicating the bids that PCS 2000 believed it had submitted.²⁴ PCS 2000 now states that the "results reported by the FCC did not reflect the bid that PCS 2000 intended to submit."²⁵ The Amended Request for Waiver also deletes the statement claiming that the print server malfunction

¹⁷ See Letter to Javier O. Lamoso, President, PCS 2000 from Michele Farquhar, Acting Chief, Wireless Telecommunications Bureau (dated February 7, 1996).

¹⁸ See PCS 2000, L.P. -- Progress Report in Response to the Commission's Letter of February 7, 1996 (filed February 14, 1996) ("Progress Report").

¹⁹ Progress Report at 2.

²⁰ *Id.*

²¹ See PCS 2000, L.P. -- Response to the Commission's Letter dated February 7, 1996 (filed February 21, 1996); Declaration of Javier O. Lamoso (attached to PCS 2000, L.P. -- Response to the Commission's Letter dated February 7, 1996 (filed February 21, 1996) ("Lamoso Declaration").

²² Lamoso Declaration at 17-18.

²³ *Id.* at 18.

²⁴ Compare Amended Request for Waiver at 2 and Request for Waiver at 2.

²⁵ Amended Waiver Request at 2.

resulted in a delay in discovering the bidding error.²⁶

7. On July 26, 1996, PCS 2000 filed an Emergency Request for Expedited Action regarding its Amended Request for Waiver.²⁷ Specifically, PCS 2000 seeks either an immediate decision by the Bureau on its Amended Request for Waiver, or, in the alternative, the prompt return of all funds on deposit with the Commission in excess of the amount required to satisfy PCS 2000's full bid withdrawal payments under Section 24.704(a)(1). On September 24, 1996, WillowRun, L.P. ("WillowRun"), one of PCS 2000's investors, filed a Motion for Leave to Submit Late Pleading and an Opposition to PCS 2000's Emergency Request.²⁸ On October 9, 1996, PCS 2000 filed an Opposition to WillowRun's Motion.²⁹

8. *Discussion.* In its *May 3 Order*, the Commission considered the issue of waivers of bid withdrawal payments and indicated that full application of the bid withdrawal payment provisions in instances of erroneous bids would cause an extreme and unnecessary hardship on most bidders. At the same time, the Commission noted that a full waiver of the bid withdrawal provisions could threaten the economic efficiency of the auction process.³⁰ The Commission therefore decided to reduce the amount of the bid withdrawal payment in cases where a bid was clearly submitted in error, taking into consideration the auction round and stage in which the

²⁶ Compare Amended Request for Waiver at 2 and Request for Waiver at 2.

²⁷ PCS 2000, L.P., "Emergency Request for Expedited Action on the Request of PCS 2000, L.P. for Waiver of the Bid Withdrawal Payment and/or Reduction of Excess Payments on Deposit," (filed July 26, 1996) ("Emergency Request").

²⁸ Willowrun, L.P., "Motion for Leave to Submit Late Pleading," (filed September 24, 1996) ("Motion") and "Opposition of WillowRun, L.P." (filed September 24, 1996) ("Opposition"). In support of its Motion, WillowRun argues that PCS 2000's Emergency Request constitutes an impermissible *ex parte* presentation to the Commission. WillowRun alleges that PCS 2000 violated the *ex parte* rules because the Request for Expedited Action addresses the merits of PCS 2000's application proceedings for C Block PCS licenses, which are the subject of a Petition to Deny filed by WillowRun on July 1, 1996, and WillowRun was not served with the Emergency Request as required by Sections 1.1202 and 1.1208 of the Commission's rules. See 47 C.F.R. § 1.1202, 1.1208. On October 9, 1996, PCS 2000 filed an Opposition to WillowRun's Motion, contending that there had been no *ex parte* violation and that WillowRun's Opposition to its Emergency Request should be dismissed. On December 11, 1996, the Commission's Office of Managing Director sent a letter to attorneys representing WillowRun and PCS 2000 granting WillowRun's Motion only for the purpose of addressing the alleged *ex parte* violation. See *Letter to Robert L Pettit and Julian P. Gehman from Andrew S. Fishel, Managing Director, Federal Communications Commission* (December 11, 1996). The Managing Director found that the emergency request raised matters under consideration in the pending restricted PCS 2000 application proceedings and therefore a copy of that request should have been served on WillowRun. Although he determined that an *ex parte* violation relating to the restricted application proceedings had occurred, he concluded that only an admonishment was warranted in the circumstances.

²⁹ PCS 2000, L.P. "Opposition to Motion to Submit Late Pleading," (filed October 9, 1996). In support of its Opposition to WillowRun's Motion, PCS 2000 contends that WillowRun is not a party to PCS 2000's pending waiver request. *Id.*

³⁰ *May 3 Order* at ¶ 14.

erroneous bids were submitted and withdrawn.³¹ Among other things, the Commission decided specifically that if a mistaken bid is withdrawn in the round immediately following the round in which it was submitted, the withdrawal payment will be the greater of (a) two times the minimum bid increment during the round in which the bid was submitted, or (b) the standard bid withdrawal payment calculated as if the bidder had made a bid at one bid increment above the minimum accepted bid.³²

9. As an initial matter, we note that although WillowRun filed a timely petition to deny PCS 2000's long-form applications, it did not file a timely opposition to PCS 2000's earlier waiver request that is the subject of this Order. Nevertheless, in light of the action of the Managing Director with regard to WillowRun's *ex parte* complaint, we will grant its Motion for Leave to Submit Late Pleading and accept its Opposition to PCS 2000's Emergency Request. However, in considering its Opposition, we do not believe that WillowRun's allegations are directly related to PCS 2000's waiver request. WillowRun's Opposition concerns alleged misrepresentations by PCS 2000's bidding agent similar to those raised in its petition to deny. Our own investigation into events surrounding PCS 2000's mistaken bid has also revealed that material misrepresentations may have been made. Those allegations of misrepresentation will be addressed in a separate proceeding. For purposes of PCS 2000's Amended Request for Waiver, however, we conclude that PCS 2000 has demonstrated that it submitted an erroneous bid of \$180,060,000 for license B324 in Round 11 of the auction. PCS 2000 further has demonstrated that it attempted to withdraw its bid in Round 12, immediately upon discovering its mistake. Three days after the submitting the erroneous bid, PCS 2000 filed a Request for Waiver of the bid withdrawal payment, supported by a sworn affidavit attesting to what it believed at the time were the factual circumstances surrounding the erroneous bid. Although PCS 2000 later determined that some of the facts contained in its original Request for Waiver were inaccurate, those facts do not change the underlying basis for the waiver request which is that an erroneous bid had been made by PCS 2000, the Commission was properly notified, and the bid was withdrawn in the next round. Under these circumstances, we find that full enforcement of the bid withdrawal payment provisions in this instance would not serve the purpose of the bid withdrawal rule, and would be contrary to the public interest. This action is not based on any additional reasons presented by PCS 2000 in its Emergency Request for Expedited Action.

10. In accordance with the Commission's *May 3 Order*, we find that a partial waiver of Section 24.704(a)(1) of the Commission's Rules is warranted. We therefore will reduce PCS 2000's required bid withdrawal payment to two times the minimum bid increment³³ for License B324 in Round 11 of the broadband PCS C Block auction, or \$3,273,374.

³¹ *Id.* at ¶¶ 17-18.

³² *Id.* at ¶ 18.

³³ For Round 11 of the Broadband PCS C Block auction, the minimum bid increment was \$1,636,687.

ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the Amended Request for Expedited Waiver or Reduction of Withdrawal Payment filed by PCS 2000, L.C. IS GRANTED to the extent indicated above.

12. IT IS FURTHER ORDERED that PCS 2000, L.P. is assessed a bid withdrawal payment in the amount of \$3,273,374 for License B324 (Norfolk, Virginia).

13. IT IS FURTHER ORDERED that PCS 2000, L.P. is assessed a bid withdrawal payment in the amount of \$ 1,257,711 for License B332 (Omaha, Nebraska).

14. IT IS FURTHER ORDERED that the sum of these amounts, or \$4,531,085, will be deducted from PCS 2000 L.P.'s upfront payment which remains on deposit with the Commission.

15. IT IS FURTHER ORDERED that the Motion to Submit Late Filed Pleading filed by WillowRun, L.P. IS GRANTED.

16. This action is taken pursuant to delegated authority, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Michele C. Farquhar
Chief, Wireless Telecommunications Bureau