



Federal Communications Commission
Washington, D.C. 20554

December 5, 2003

DA 03-3890

Douglas Thomas
115 Farwood
Moreland Hills, OH 44022-6852

Dear Mr. Thomas:

This letter responds to the Request for Waiver that you filed on November 12, 2003 with your FCC Form 175 application to participate in the Multichannel Video Distribution and Data Service ("MVDDS") auction (Auction No. 53).¹ You request that we waive the Commission's upfront payment requirement in order to allow you to bid in Auction No. 53. For the reasons set forth below, we deny your request.

To obtain a waiver of the Commission's competitive bidding rules,² an applicant must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.³

Section 1.2106 of the Commission's rules provides that the Commission may require applicants to submit an upfront payment.⁴ If the applicant does not submit at least the minimum upfront payment, it will be ineligible to bid, its application will be dismissed and any upfront payment it has made will be returned.⁵ In the *Auction No. 53 Procedures Public Notice*,⁶ the Bureau stated that the applicant's total upfront payment must be enough to establish eligibility to

¹ FCC Form 175 Application of Douglas Thomas dated November 12, 2003, Exhibit E.

² 47 C.F.R. § 1.2106 (c).

³ 47 C.F.R. § 1.925.

⁴ 47 C.F.R. § 1.2106 (a). The Commission has delegated to the Wireless Telecommunications Bureau (the "Bureau") the authority and discretion to determine appropriate upfront payments for each auction. Amendment of Part 1 of the Commission's Rules — Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5697-5698, ¶ 16 (1997) ("*Part 1 Order*").

⁵ 47 C.F.R. § 1.2106 (c).

⁶ See Auction of Licenses in the Multichannel Video Distribution and Data Service Rescheduled for January 14, 2003, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payment and Other Auction Procedures, *Public Notice*, DA 03-2354, at 17 (rel. August 28, 2003) ("*Auction No. 53 Procedures Public Notice*").

bid on at least one of the licenses applied for on FCC Form 175, or else the applicant will not be eligible to participate in the auction.⁷ The Bureau warned applicants that “[f]ailure to deliver the upfront payment by the December 8, 2003, deadline will result in dismissal of the application and disqualification from participation in the auction.”⁸

You contend that while you will be able to pay a portion of the upfront payment, it will be impossible for you to submit the total amount that is required. You assert that you have been a successful bidder in previous auctions and that you have rendered all payments to the Commission as required. You also state that you will restrict your bids to the two licenses you have selected on your short-form application, Bluefield-Beckley-Oak Hill (Designated Market Area (“DMA”) -149) and Wheeling-Steubenville (DMA-150).

We find that you have not satisfied the Commission’s criteria for granting a waiver of the Commission’s upfront payment requirement. The Commission adopted the upfront payment requirement in order to ensure that only serious, qualified bidders participate in our auctions.⁹ The upfront payment requirement ensures the validity of the information generated during auctions and increases the likelihood that licenses will be awarded to those qualified bidders who value them the most, thus promoting the rapid deployment of new technology.¹⁰ Upfront payments also provide the Commission with a source of available funds in the event that a bid withdrawal penalty must be assessed.¹¹ You have not shown that enforcing the upfront payment requirement would frustrate these purposes or even would not serve them.

Moreover, you have not demonstrated unique facts and circumstances that merit granting a waiver in this case. Your request states only that it will be impossible for you to submit the total amount of the upfront payment. This assertion, by itself, is insufficient justification for a waiver of the Commission’s rule. Allowing a waiver of the upfront payment requirement in this instance would lead to an inconsistent application of our rules and would not serve the public interest. The Commission’s rules are best served by applying the upfront payment requirement in a fair and consistent manner.

Accordingly, your request for a waiver of the upfront payment requirement for Auction No. 53 is denied. This action is taken under delegated authority pursuant to Section 0.331 of the

⁷ The Bureau notified applicants that in order to be eligible to bid, applicants must submit an upfront payment by 6:00 p.m. ET on December 8, 2003.

⁸ See *Auction No. 53 Procedures Public Notice* at 18.

⁹ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2378 ¶ 171 (1994); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7266 ¶ 125 (1994).

¹⁰ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Memorandum Opinion and Order* at ¶ 125.

¹¹ *Id.* While the Commission has, on a few occasions, waived the deadline for submitting an upfront payment, it has never waived the payment requirement itself.

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Commission's rules.¹²

Sincerely,

Margaret W. Wiener
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

¹² 47 C.F.R. § 0.331.