

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

In the Matter of)
)
)
RUSH NETWORK CORP.) File No. 0000002616
)
)
Application for Phase II 220 MHz Licenses)
To Serve BEA053, Pittsburgh, PA-WV, BEA067,)
Indianapolis, IN-IL, BEA099, Kansas City,)
MO-KS, BEA124, Tulsa, OK-KS, BEA125,)
Oklahoma City, OK, BEA129, San Angelo, TX)
BEA132 Corpus Christi, TX, BEA133,)
McAllen-Edinberg-Mission, TX, BEA134,)
San Antonio, TX, BEA135, Odessa-Midland, TX)
)

ORDER

Adopted: November 24, 1998
Released: November 24, 1998

By the Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION AND BACKGROUND

1. We have before us a request for a waiver (Waiver Request) filed on November 13, 1998, by Rush Network Corp. (Rush).¹ Rush seeks waiver of section 90.1013 of the Commission's Rules, which requires each successful bidder for a 220 MHz geographic area license to submit its long-form application within ten business days of being notified by Public Notice that it is the winning bidder.² For the reasons stated below, we deny Rush's Waiver Request, dismiss its long-form application, and impose default payment obligations on Rush.

2. On October 23, 1998, the Bureau announced by Public Notice the winning bidders in the Phase II 220 MHz auction (Auction No. 18).³ This Public Notice announced that Rush was the winning bidder in this auction for the E Block in the following Economic Areas (EAs): BEA053, Pittsburgh, PA-WV; BEA067, Indianapolis, IN-IL; BEA099, Kansas City, MO-KS; BEA124, Tulsa, OK-KS; BEA125,

¹ Rush's Waiver Request was attached as Exhibit F to its FCC Form 601. See FCC Form 601, File No. 0000002616, Rush Network Corp., Exhibit F, filed November 13, 1998 (*Rush Application*).

² 47 C.F.R. § 90.1013.

³ See Phase II 220 MHz Service Auction Closes, Auction No. 18, *Public Notice*, DA 98-2143 (rel. Oct. 23, 1998) (*Phase II 220 MHz Public Notice*).

Oklahoma City, OK; BEA129, San Angelo, TX; BEA132, Corpus Christi, TX; BEA133, McAllen-Edinberg-Mission, TX; BEA134, San Antonio, TX; and BEA135, Odessa-Midland, TX.⁴ Pursuant to sections 90.1011 and 90.1013 of the Commission's Rules,⁵ Rush was required to submit a down payment equal to 20 percent of its net winning bid amount,⁶ and to file its FCC Form 601 no later than November 6, 1998.⁷ Although Rush submitted its required down payment in a timely manner, Rush filed its long-form application, which included its Waiver Request, on November 13, 1998, seven days after the long-form application filing deadline.⁸

3. Section 1.2107(c) provides in relevant part that any applicant that fails to timely submit its long-form application, and fails to establish good cause for its late-filed submission is deemed to be in default.⁹ The Commission's Rules also provide that a defaulting winning bidder is liable for default payment obligations.¹⁰ This default payment is 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 (provided that the subsequent winning bid is less than the initial winning bid), plus an additional payment equal to three percent of the defaulter's bid, or the subsequent bid, whichever is less.¹¹ In the event that the default payment cannot be determined (*i.e.*, because a license has not yet been reaucted), the Commission has stated that it will assess an initial default payment of up to 20 percent of the defaulted bid price until the full amount of the payment can be determined.¹²

II. DISCUSSION

⁴ *Id.*, Attachment A.

⁵ 47 C.F.R. §§ 90.1011, 90.1013; *see also* 47 C.F.R. § 1.2107.

⁶ Pursuant to sections 90.1017(a) and 90.1021(b)(2) the Commission's Rules, Rush qualifies as a "very small business" and is entitled to a 35 percent bidding credit. *See* 47 C.F.R. §§ 90.1017(a), 90.1021(b)(2). Rush's total gross winning bid amount, excluding the 35 percent bidding credit, was \$99,900. With the 35 percent bidding credit, Rush's total net winning bid amount was \$64,935. *See Phase II 220 MHz Public Notice*, Attachment A. As a "very small business" Rush's default penalty payment obligations are based on its net winning bid. *See* 47 C.F.R. § 1.2104(g)(1)-(2).

⁷ The Commission's Rules require each successful bidder to submit its long-form application within ten business days after the release of the Public Notice announcing that it is the winning bidder. 47 C.F.R. §§ 1.2107(c), 90.1013. The *Phase II 220 MHz Public Notice* was released on October 23, 1998. Accordingly, the long-form filing deadline for the Phase II 220 MHz auction was November 6, 1998.

⁸ *Rush Application*.

⁹ 47 C.F.R. § 1.2107(c).

¹⁰ 47 C.F.R. § 1.2109(c).

¹¹ 47 C.F.R. § 1.2104(g)(1)-(2).

¹² In the Matter of Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, *Third Report and Order and Second Notice of Proposed Rule Making*, 13 FCC Rcd. 374, 434, ¶ 102 (1997) (*Competitive Bidding Third Report and Order*).

4. Rush contends that it only missed the application filing deadline and is not in default because it made the required down payment by the November 6, 1998 deadline.¹³ We find that Rush is in default because it failed to timely file its long-form application as required by section 90.1013 of the Commission's Rules. Section 90.1013 specifically states that applications for 220 MHz geographic licenses on FCC Form 601 must be submitted in accordance with section 1.2107 of the Commission's Rules.¹⁴ Section 1.2107(c) provides in relevant part that "[a]n applicant that fails to submit the required long-form application under this paragraph and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the payments set forth in section 1.2104."¹⁵ Accordingly, Rush is in default and subject to the default payments unless it can establish good cause for the late filing.

5. On the basis of the record before us, we also reject Rush's request for a waiver. A request for a waiver of the Commission's Rules must "set forth the reasons in support thereof including a showing that unique circumstances are involved and that there is no reasonable alternative solution within existing rules."¹⁶ Rush contends that as a two-person company that owns several licenses in different wireless services, its responsibilities were extended beyond its resources.¹⁷ Specifically, Rush states that it was preparing comments to file in a Commission rulemaking proceeding involving the 218-219 MHz service.¹⁸ Rush also states that both of its employees were required to be away from the office for meetings with potential clients.¹⁹ Rush concludes that while "none of these events . . . constitute[s] a single excuse for missing the filing deadline, taken together they did cause Rush to allow the deadline to pass without making the filing."²⁰ These circumstances are not, however, unique or unusual and do not support the grant of a waiver of the filing deadline. Although Rush is a "very small business" that may face a busy schedule, this does not excuse Rush for missing the long-form filing deadline. The other winning bidders complied with the filing deadline and Rush has not identified any unusual demands on its resources that would warrant granting a waiver in this case.²¹

¹³ Waiver Request at 3.

¹⁴ 47 C.F.R. § 90.1013.

¹⁵ 47 C.F.R. § 1.2107(c).

¹⁶ See 47 C.F.R. § 90.151. See also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (citation omitted) *cert. denied* 409 U.S. 1027 (1972).

¹⁷ Waiver Request at 4.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *In the Matter of Pinpoint Communications, Inc.*, File No. 0000000140, Application for Local Multipoint distribution Service Licenses to Serve BTA185, Hastings, Nebraska and BTA270, McCook, Nebraska, *Order*, DA 98-1922 (rel. September 22, 1998), *recon. pending*.

6. Rush further argues that it plans to use the licenses for the markets it won in the Phase II 220 MHz auction in conjunction with its Phase I nationwide 220 MHz license, and that "failure to obtain the licenses from the auction will significantly frustrate Rush's ability to deploy this system."²² In its Waiver Request, Rush details its business plan for its proposed system and asks the Commission to find that the benefits of its proposed system outweigh the adherence to a strict deadline which would delay service to the public.²³ These factors do not justify the grant of a waiver. The underlying purpose of the requirement that a winning bidder be found in default if it fails to file its long-form application by the filing deadline is to ensure an orderly licensing process and to facilitate rapid deployment of new services. Accordingly, if a waiver of the rules is not limited to unique or unusual circumstances, it would compromise the integrity of the licensing process and reduce the critically important incentives that winning bidders have to timely file their long-form applications.

7. Rush filed its long-form application seven days after the filing deadline. As such, it is in default, and is subject to the default payments set forth under the Commission's Rules.²⁴ Because the subject EAs have yet to be reaucted and we cannot yet determine the full amount of Rush's default payment, we will assess a deposit toward the default payment ultimately owed by Rush.²⁵ Although the Commission provided that this deposit amount will be up to 20 percent of the bid on which Rush defaulted,²⁶ we note that if any of the subject licenses are reaucted for amounts greater than Rush's bid for these licenses, the default payments due will be only three percent of Rush's defaulted bids.²⁷ Consequently, a three percent payment is the minimum amount that Rush would owe under even the most favorable circumstances. We therefore require a deposit of three percent of Rush's defaulted net high bid for the subject licenses, or \$1,948.05. Pursuant to section 1.2104(g), this payment will be deducted from the upfront payment amount that Rush has on deposit with the Commission.²⁸ If additional payment is required following the reauction of the subject licenses, a second Order will assess such payment.

III. ORDERING CLAUSES

8. Accordingly, pursuant to sections 0.331, 1.3 and 90.151 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.3, 90.151, IT IS ORDERED, that the Waiver Request, filed on November 13, 1998, by Rush Network Corp., is DENIED.

9. IT IS FURTHER ORDERED, pursuant to 0.331 and 90.161 of the Commission's Rules, 47 C.F.R. §§ 0.331, 90.161, that the FCC Form 601, File No. 0000002616, filed on November 13, 1998, by Rush Network Corp., is DISMISSED.

²² Waiver Request at 5.

²³ *Id.*

²⁴ 47 C.F.R. §§ 1.2107(c), 1.2104(g)(1)-(2).

²⁵ *See Competitive Bidding Third Report and Order*, 13 FCC Rcd. at 434, ¶ 102.

²⁶ *Id.*

²⁷ 47 C.F.R. § 1.2104(g)(2).

²⁸ 47 C.F.R. § 1.2104(g).

10. IT IS FURTHER ORDERED, pursuant to 0.331, 1.2104(g), 1.2107 and 90.1007 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.2104(g), 1.2107, 90.1007, that Rush Network Corp. is assessed an initial default payment in the amount of \$1,948.05.

11. IT IS FURTHER ORDERED, pursuant to section 1.2104(g) of the Commission's Rules, 47 C.F.R. § 1.2104(g), that the initial default payment shall be deducted from Rush Network Corp.'s down payment of \$12,987.00.

12. IT IS FURTHER ORDERED, pursuant to section 1.2104(g) of the Commission's Rules, 47 C.F.R. § 1.2104(g), that Rush Network Corp. will be subject to the balance of the default payment after BEA053, Pittsburgh, PA-WV; BEA067, Indianapolis, IN-IL; BEA099, Kansas City, MO-KS; BEA124, Tulsa, OK-KS; BEA125, Oklahoma City, OK; BEA129, San Angelo, TX; BEA132, Corpus Christi, TX; BEA133, McAllen-Edinberg-Mission, TX; BEA134, San Antonio, TX; and BEA135, Odessa-Midland, TX, are reauctoned, and the actual default payment is determined.

FEDERAL COMMUNICATIONS COMMISSION

Steve E. Weingarten
Chief, Commercial Wireless Division
Wireless Telecommunications Bureau