

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Request for Waiver of Section)
1.2104(g) of the Commission's Rules)
filed by Grand Connectivity L.L.C.)

ORDER

Adopted: August 27, 1999

Released: August 27, 1999

By the Chief, Auctions and Industry Analysis Division:

1. On June 14, 1999, Grand Connectivity L.L.C. ("Grand Connectivity") filed a request with the Wireless Telecommunications Bureau, seeking a waiver of Section 1.2104(g) of the Commission's Rules,¹ which governs its default payment obligations with respect to Local Multipoint Distribution Service ("LMDS") licenses won in Auction No. 23.² Grand Connectivity also requested that the Commission return its upfront payment. In a letter dated and transmitted by facsimile on June 18, 1999, Grand Connectivity, without conceding that it would ultimately owe a default payment, requests a refund of a portion of its upfront payment, rather than the entire amount.³ For the reasons stated below, we deny Grand Connectivity's waiver request, assess an initial default payment, and return the remaining portion of Grand Connectivity's upfront payment.

2. Background. On May 12, 1999, the Commission completed Auction No. 23, its auction of 161 LMDS licenses. On May 14, 1999, the Commission announced, by Public Notice,

¹ 47 C.F.R. § 1.2104(g).

² Request for Waiver of Section 1.2104(g) for Grand Connectivity L.L.C., High Bidder in LMDS Auction No. 23 (filed June 14, 1999) ("Waiver Request").

³ Letter to Gail Glasser, Office of Managing Director, Federal Communications Commission, from Suzanne S. Goodwyn, Pepper & Corazzini, LLP, Counsel for Grand Connectivity, L.L.C. (dated June 18, 1999) ("Supplementary Request"). Grand Connectivity requests an immediate refund of \$69,760.50, pending resolution of the Waiver Request. This sum represents the balance of Grand Connectivity's upfront payment after the application of the Commission's three percent default payment rule (*see* ¶¶ 4, 12 *infra*).

that a down payment of 20 percent of net winning bids was due from all winning bidders on or before May 28, 1999.⁴ At the conclusion of the auction, Grand Connectivity was the high bidder on seven licenses⁵ with total net bids of \$2,674,650. To comply with the Commission's down payment requirement,⁶ Grand Connectivity was obligated to supplement its \$150,000 upfront payment with an additional deposit of \$384,930.⁷ Grand did not submit its down payment, thereby defaulting and triggering the default payment provisions of Section 1.2104(g).⁸

3. Discussion. Section 1.925 of the Commission's Rules provides that a waiver of Part 1.2104(g) of the Commission's Rules is appropriate when a petitioner demonstrates that

(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or

(ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁹

Because Grand Connectivity fails to make either showing, we deny its waiver request.

4. Under the Commission's Rules, if a winning bidder fails to timely remit the required down payment, it will be deemed to have defaulted on its auction payment obligations.¹⁰ Defaulters are subject to a default payment comprised of two components that are added together

⁴ Local Multipoint Distribution Service Auction Closes, DA 99-927, *Public Notice* (rel. May 8, 1996). ("LMDS Closing Public Notice").

⁵ Grand Connectivity was the high bidder on the following licenses: B390A (Saginaw, MI), B039B (Benton Harbor, MI), B169B (Grand Rapids, MI), B209B (Jackson, MI), B241B (Lansing, MI), B307B (Mt. Pleasant), and B310B (Muskegon, MI). See Default Withholding, attached hereto as Attachment A.

⁶ See 47 C.F.R. § 101.1105(b).

⁷ See LMDS Closing Public Notice, Attachment B.

⁸ See 47 C.F.R. § 1.2109(b): "If a winning bidder . . . fails to remit the required down payment within ten (10) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default payment specified in Section 1.2104(g)(2)."

⁹ 47 C.F.R. § 1.925. This rule replaces the former Part 101 rule regarding waivers, 47 C.F.R. § 101.23.

¹⁰ 47 C.F.R. § 1.2109(b).

to calculate the full default payment.¹¹ The first component of the default payment is the difference between the gross defaulted bid and the gross subsequent winning bid, or the difference between the net defaulted bid and the net subsequent winning bid, whichever is less.¹² In the event that the difference between either the gross bids or the net bids, as calculated above, is less than or equal to zero, the first component of the payment will be set to zero. The second component of the payment is computed by taking three percent of the subsequent winning bid or the defaulted bid, whichever is less. Where a bidding credit applies to the winning bid from either the original or the subsequent auction, the calculation of the three percent payment is based on the smaller of the two gross bids or smaller of the two net bids, whichever basis (gross or net) was used to figure the first component. Thus, if the difference between the gross bids is less than the difference between the net bids, the three percent payment will be computed on the lower of the gross bids. If the difference between the net bids is less than or equal to the difference between the gross bids, the three percent payment will be computed on the lower of the net bids. However, if the differences between both the gross bids and the net bids are less than or equal to zero, three percent payment will be computed on the lower of the net bids.

5. The purpose of the default payment provisions, Section 1.2104(g)(2) of the Commission's rules, is to assure that the winning bidder is obligated to pay the full amount of its winning bid (less any mitigation of damages arising from a subsequent auction of the spectrum) even if the winning bidder defaults or is determined to be disqualified and is never granted a license.¹³ The winning bidder's contractual obligation to pay the winning bid thus becomes fixed and established at the close of the auction, and the winning bidder, not the Commission or the taxpayer, bears the risk of change in the market between the acceptance of the winning bid and the grant of the license.¹⁴ A winning bidder that chooses to default, rather than comply with the payment obligation, will, therefore, still be obligated to make the Commission whole for the amount of the winning bid, subject to any mitigation of damages as a result of a subsequent auction of a license for the same spectrum.¹⁵

¹¹ 47 C.F.R. § 1.2104(g).

¹² The gross bid is the dollar amount bid, exclusive of any bidding credits. The net bid is the dollar amount bid taking account of any bidding credit for which the high bidder is eligible under Commission Rules.

¹³ 47 C.F.R. § 1.2104(g)(2).

¹⁴ Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications (PCS) Licensees, Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Second Order on Reconsideration of the Second Report and Order*, FCC 99-66, n.66 (rel. April 5, 1999).

¹⁵ See *In the Matter of Baker Creek Communications, L.P. for Authority to Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas*, File No. 0000000111, *Order*, DA 99-1037 (rel. July 15, 1999).

6. The default payment amount is deducted from any upfront payments or down payments that the defaulting bidder has deposited with the Commission. In the event that the default payment cannot be determined (*i.e.*, because a license has not yet been won in a subsequent auction), the Commission has stated that it will assess an initial default deposit of between three (3) and twenty (20) percent of the defaulted bid price until the full amount of the default payment can be determined.¹⁶ Prior to the release of a Bureau Order assessing a default payment, Grand Connectivity filed its waiver request, requesting that the Commission waive the default payment required by the rules and return its entire upfront payment.

7. Grand Connectivity's request states that its original plan was to bid on several Michigan licenses in Auction No. 23.¹⁷ On April 30, 1999, after the seventh round of the auction, Grand Connectivity alleges that it was contacted by Centennial Cellular Corp. ("Centennial") about entering a contract in which Grand Connectivity would instead acquire the San Juan, Puerto Rico A block license.¹⁸ By Grand Connectivity's account, business discussions with Centennial ceased on May 6, without a finalized contract, when Centennial withdrew its offer.¹⁹ During the negotiations 15 rounds passed in which Grand Connectivity claims that it continued to bid on the Michigan licenses in order to preserve its eligibility for the San Juan license, even though the bidding had exceeded Grand Connectivity's projected budget.²⁰ Grand Connectivity claims to have stopped bidding after Centennial withdrew its offer on May 6.²¹ After the conclusion of the auction, Grand Connectivity was the standing high bidder for seven licenses.²² It then attempted, unsuccessfully, to seek additional financing.²³ Grand Connectivity posits that the Commission designed the default rules to "deter bidders from bidding beyond their means rather than as a punishment to bidders who lost their financing during the course of an auction."²⁴ Grand Connectivity argues that it was a responsible bidder that "mistakenly relied on its agreement with

¹⁶ Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, ¶ 102 (1997).

¹⁷ Waiver Request at 2.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 2-3.

²¹ *Id.* at 3.

²² See note 4 and *LMDS Closing Public Notice*.

²³ Waiver Request at 3.

²⁴ *Id.*

Centennial."²⁵

8. Commission rules provide that a bidder that withdraws a high bid during the course of an auction is subject to a bid withdrawal payment equal to the difference between the amount withdrawn and the amount of the subsequent winning bid. If a high bid is withdrawn on a license that remains unsold at the close of the auction, this bidder will be required to make an interim payment equal to three (3) percent of the net amount of the withdrawn bid.²⁶ Grand Connectivity asserts that withdrawing its high bids "was not an option" because of "the vast difference in bids between auctions [*i.e.*, Auction Nos. 17 and 23], and the uncertainty of whether the second highest bidder would choose to obtain these BTAs. . . ."²⁷ We disagree with this analysis and conclude that Grand Connectivity's best option was to withdraw its bids. By withdrawing during the auction, Grand Connectivity would have eliminated the possibility that it would owe default payments. In addition, the licenses could have been bid on by other bidders, thereby allowing service to get to the public more quickly. These are precisely the reasons why we allow, and encourage, bid withdrawal during an auction, rather than default after the close of the auction. Further, the Commission has made clear that it is not responsible for the private business arrangements that an applicant has made to finance its successful bid,²⁸ nor can it "police the private business activities of each bidder."²⁹ We find particularly troubling the fact that Grand Connectivity continued to bid "when bids began exceeding its projected budget"³⁰ because the Commission has identified this sort of bidding as inappropriate in the past.³¹ Accordingly, we find that application of the default payment rule in this case would serve its underlying purpose and that Grand Connectivity has not shown unique or unusual circumstances or lack of a reasonable

²⁵ *Id.*

²⁶ See *LMDS Closing Public Notice*.

²⁷ Waiver Request at 3. Grand Connectivity notes that the Auction No. 23 high bids exceeded the bids for the same licenses in Auction No. 17, and speculates that its licenses would not reach Auction No. 23 prices in a future auction. Grand Connectivity apparently feared that this would create liability for large withdrawal payments, had it withdrawn its bids. Thus, Grand Connectivity believed its best option was to keep its high bids and try to find additional financing after the close of the auction. *Id.* at 3-4.

²⁸ Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 9 FCC Rcd. 6384, 6385 (CAB 1994) (*IVDS Waiver Order*), *review denied*, 10 FCC Rcd 12153, 12155 (1995), *recon. denied*, 11 FCC Rcd 8211, 8216-17 (1996).

²⁹ See BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, FCC 96-498, ¶ 8 (rel. January 6, 1997).

³⁰ Waiver Request at 3.

³¹ BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, FCC 97-300, ¶ 12 (rel. Sept. 29, 1997) (bidder maintained high bids on 16 licenses and continued bidding on one license after it lost its source of financing).

alternative. Grand Connectivity's waiver request is, therefore, denied.

9. Grand Connectivity seeks a refund of the amount of its upfront payment that exceeds its default payment obligations. Section 1.2106(d) of the Commission's rules permits refunds of upfront payments when the upfront payment amount exceeds the required down payment amount and any bid withdrawal payments owed.³² Grand Connectivity has submitted an upfront payment of \$150,000.³³ This amount on deposit is sufficient to satisfy Grand Connectivity's initial default payment obligation of \$80,241.³⁴ Therefore, we will refund to Grand Connectivity its remaining amount on deposit after the three percent default payment is computed and assessed. In order to process your refund request, the FCC must receive wire transfer instructions.³⁵ If an additional payment is required following the next LMDS auction, a second Order will assess the amount due.

10. Accordingly, Grand Connectivity is assessed an initial default payment on the licenses for B390A (Saginaw, MI), B039B (Benton Harbor, MI), B169B (Grand Rapids, MI), B209B (Jackson, MI), B241B (Lansing, MI), B307B (Mt. Pleasant), and B310B (Muskegon, MI), and its application with respect to these seven licenses is dismissed. In addition, Grand Connectivity will be subject to the balance of the payment specified in Section 1.2104(g) once the aforementioned licenses are auctioned and the actual default payment for each license is determined.³⁶

11. Accordingly, IT IS ORDERED that the Request for Waiver filed by Grand Connectivity on June 14, 1999, IS DENIED.

³² 47 C.F.R. § 1.2106(d).

³³ See Default Withholding, attached hereto as Attachment A.

³⁴ *Id.*

³⁵ See Transfer Instructions, attached hereto as Attachment B.

³⁶ 47 C.F.R. § 1.2104(g)(2).

12. Accordingly, Grand Connectivity's initial default payment is satisfied and any remaining amount after the three percent default payment is assessed will be refunded to Grand Connectivity.

FEDERAL COMMUNICATIONS COMMISSION

Amy J. Zoslov
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

Grand Connectivity L.L.C.

Default Withholding

License Number	Blk	Market	Default Gross High Bid	Default Net High Bid	3% of Defaulted Net High Bid
LDBTA039B	B	Benton Harbor, MI	\$201,000	\$110,550	\$3,317
LDBTA169B	B	Grand Rapids, MI	\$1,669,000	\$917,950	\$27,539
LDBTA209B	B	Jackson, MI	\$258,000	\$141,900	\$4,257
LDBTA241B	B	Lansing, MI	\$936,000	\$514,800	\$15,444
LDBTA307B	B	Mt. Pleasant, MI	\$149,000	\$81,950	\$2,459
LDBTA310B	B	Muskegon, MI	\$302,000	\$166,100	\$4,983
LDBTA390A	A	Saginaw-Bay City, MI	\$1,348,000	\$741,400	\$22,242
Total			\$4,863,000	\$2,674,650	\$80,241

Upfront Payment	\$150,000
Less 3% Default Payment	\$80,241
Refund	\$69,759

ATTACHMENT B Transfer Instructions

In order to process refund requests, the FCC must receive wire transfer instructions that include the following information:

Name and Address of Bank
ABA Number
Contact and Phone Number
Account Number to Credit
Name of Account Holder
Correspondent Bank (if applicable)
ABA Number
Account Number

Please include your Taxpayer Identification Number ("TIN"), and a copy of this Order (DA 99-1726). This information should be sent to the Auctions Accounting Group:

Federal Communications Commission
Auctions Accounting Group
Attn: Michelle Bennett or Gail Glasser
445 12th Street, SW, Room 1-A843
Washington, DC 20554

Bidders can also fax their request to the Auctions Accounting Group at (202) 418-2843. Once the request has been processed, a refund will be sent to the address provided on the FCC Form 159.