

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

In the Matter of)	
)	
High Tech Communications Services, Inc.)	File No. 0000000001
Request for Waiver of)	
Section 90.905 of the)	
Commission's Rules)	
Market: EA174A)	

ORDER

Adopted: September 2, 1999

Released: September 2, 1999

By the Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. By this Order, we partially grant a request for waiver of the Commission's rules filed by High Tech Communications Services, Inc. ("High Tech"),¹ the winning bidder for an A Block license for Puerto Rico and the Virgin Islands in the 800 MHz band Specialized Mobile Radio ("SMR") service auction that closed on December 8, 1997.²

2. On March 10, 1998, the Wireless Telecommunications Bureau released a Public Notice conditionally granting various applications for SMR licenses in the A, B, and C Blocks, including that filed by High Tech. In the Public Notice, applicants were notified that the grant of each license was conditioned on the full and timely payment of the remaining balance of the applicant's winning bid by March 24, 1998.³ The total payment owed by High Tech as of March 24, 1998, was \$946,200. High Tech missed this deadline. Two days later, however, on March 26, 1998, Banco Popular of Puerto Rico ("Banco Popular") transferred \$946,200 from High Tech's bank account to the Commission.

3. High Tech states that its payment was delinquent because its bank, Banco Popular, failed to follow its specific payment instructions. According to an affidavit submitted by High Tech's President, Mildred Berenice Martinez Estevez, High Tech secured a loan in the amount of \$700,000 from Banco Popular in February 1998 and some time thereafter informed the bank that it needed the money to be available for a wire transfer by March 24, 1998. The affidavit also states that bank officials informed High Tech on March 20, 1998, and on March 23, 1998, that the loan was approved but that a signature from another bank official who was out of Puerto Rico was still needed to transfer the money. Ms. Martinez Estevez claims that on March 25, 1998, the \$700,000 from the Banco Popular loan was deposited in High

¹ High Tech Communications Services, Inc., Request for Waiver of Rule 90.905, filed December 4, 1998 ("Waiver Request").

² See *Public Notice*, FCC Announces the Corrected Conditional Grant of 800 MHz SMR Licenses, 13 FCC Rcd. 5054 (1998).

³ *Id.*

Tech's bank account, which contained the additional \$246,200 necessary for the final payment, and the wire transfer arrangement for the FCC was completed. However, she notes, "due to [the bank's] computer systems," the money was not transferred until March 26, 1998. Nonetheless, High Tech claims that it understood that the Commission had accepted the late payment because, for several months, it failed to receive any notice or correspondence from the Commission indicating that because of the late payment to the FCC the license would not be authorized.⁴ High Tech states that it was not until November 20, 1998, that it was informed by the Commission that no license could be issued unless the Commission granted High Tech a waiver of the applicable payment deadline.⁵ As of this date, High Tech has not yet received its license.

4. High Tech seeks a waiver of section 90.905 of the Commission's rules, which imposes default payments on bidders that default after the close of an auction.⁶ We note, however, that under section 1.2109(a) of the Commission's rules, which was amended and became effective in its present form on March 16, 1998, if a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due. If a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to be in default on its license and subject to the applicable default payments.⁷ High Tech paid the balance of its winning bid prior to the late payment deadline, but it did not fully meet the requirements of section 1.2109(a) because its March 26, 1998 late payment was not accompanied by a five percent late fee.

5. Under section 1.3 of the Commission's rules, a waiver may be granted for good cause shown.⁸ As interpreted by the courts, this standard requires that a petitioner demonstrate that "special circumstances warrant a deviation from the general rule and such a deviation will serve the public interest."⁹ We believe that High Tech has presented sufficient facts to meet the standard for a waiver of the deadline for submitting the five percent late payment fee required under section 1.2109(a) of the Commission's rules, and we will therefore allow it to submit its late payment fee after the deadline. There is no indication in the record that the late wire transfer was part of a deliberate effort by High Tech to delay payment.¹⁰ Rather, High Tech's pleadings and actions demonstrate that it had every intention of meeting its payment obligation on

⁴ Waiver Request, Exhibit 7, Sworn Statement of Mildred Berenice Martinez Estevez at 2.

⁵ Waiver Request at 3.

⁶ 47 C.F.R. § 90.905. Under 47 C.F.R. § 90.907, winning bidders must make full payment of the balance of their winning bids ten business days after issuance of the Public Notice announcing that the Commission is prepared to award the license.

⁷ 47 C.F.R. § 1.2109(a).

⁸ 47 C.F.R. § 1.3. At the time of High Tech's waiver request, an applicant seeking a waiver of section 90.905 was required under 47 C.F.R. § 90.151 to show that unique circumstances were involved and that there was no reasonable alternative solution within the existing rules.

⁹ Arctic Slope Telephone Association Cooperative, Inc., *Order*, 13 FCC Rcd. 24217, 24219 (CCB 1998)(citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1970)).

¹⁰ *See, e.g.*, Metricom, Inc., *Order*, 13 FCC Rcd. 890, 892 (WTB 1998) (Wireless Telecommunications Bureau granted waiver of payment rules where auction winner, Metricom, missed payment deadline allegedly because of bank's failure to follow Metricom's specific wire transfer instructions, but sent corrected wire transfer two days later).

time. The record shows, for example, that High Tech secured the loan of \$700,000 from Banco Popular in February 1998, and instructed the bank to transfer payment of the balance of its winning bid to the Commission by March 24, 1998. However, due to bank procedures, the monies were not transferred to the Commission until two days past the payment deadline. In addition, we believe that the circumstances here are unique because, while amended section 1.2109(a) was not in effect on December 4, 1997, at the close of the 800 MHz SMR auction, or on March 10, 1998, when the Commission issued its Public Notice announcing the conditional grant of the licenses, the amended rule was in effect on March 24, 1998, when High Tech's final payment became due. Thus, High Tech could reasonably have been confused regarding the applicability of amended section 1.2109 to its late payment. Given these circumstances, and the fact that High Tech paid the balance of its winning bid prior to the late payment deadline, we find that High Tech should be granted a waiver of the deadline for paying the five percent late fee. We emphasize, however, that we consider the circumstances surrounding High Tech's late payment unique, based on the foregoing discussion, and we do not expect to routinely grant waivers of section 1.2109 in the future.

6. We do not believe that High Tech is entitled to a waiver of its obligation under section 1.2109(a) to pay the five percent late fee. As the Commission has previously noted, the continued integrity and efficient functioning of the auction process is dependent on the prompt payment of an applicant's obligations.¹¹ Timeliness of payments is a necessary indication that a winning bidder is financially able to meet its obligations and intends to use the license to provide services to the public. Prompt payment requirements also deter defaults by discouraging insincere or financially unqualified bidders from "shopping" a winning bid in order to obtain financing.¹² Moreover, the Commission has routinely stated that the ability to make timely payments is the responsibility of auction winners.¹³ High Tech, therefore, bore ultimate responsibility for ensuring that it met the Commission's payment deadline. We note also that the Commission's default rules exist in part to provide licensees with the incentive to maintain adequate systems for transferring payments to the Commission.¹⁴ Thus, as we have indicated above, High Tech will be required, pursuant to section 1.2109(a), to pay a late payment fee of five percent of \$946,200, *i.e.*, \$47,310.

7. High Tech argues that as of March 26, 1998, it has paid the FCC \$1,182,750.00, from which the Commission has been earning interest. High Tech, therefore, requests that if it is assessed a late fee, the interest amount should be deducted from such a fee. In the alternative, High Tech alleges that since it mistakenly classified itself as a small business rather than a very small business on its FCC Form 175 application for the 800 MHz SMR auction, thereby qualifying for only a 25 percent bidding credit rather than a 35 percent credit, the Commission should apply the 10 percent difference (\$157,700) to any late payment it assesses.

8. We decline to adjust the amount of the late payment that we are assessing High Tech in this order, either through crediting of interest or modifying High Tech's designated entity status. All payments made by High Tech in connection with the 800 MHz SMR auction became the property of the U.S. government when made, and any interest thereon is the property of the U.S. government. Accordingly, High Tech may not use the interest on such funds to reduce the size of its late payment fee. Moreover, by

¹¹ *Id.* at 891 (citing BDPCS, Inc., Emergency Petition for Waiver of Section 24.711 (a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd. 3230 ¶ 7 (1997)).

¹² *Id.* at 892 (citation omitted).

¹³ *Id.*

¹⁴ *Id.*

requesting that the late payment fee be reduced in order to reflect very small business rather than small business status, High Tech is essentially asking the Commission to allow it to amend its FCC Form 175 application. The Commission has previously rejected requests to amend a winning applicant's designated entity status once the auction has been completed, finding that such an amendment would affect the integrity of the bidding process.¹⁵ Accordingly, we reject High Tech's request that we reduce its late payment by changing its status from small business to very small business.

9. For the reasons stated above, pursuant to section 4(i) of the Communications Act, as amended, and section 1.3, 47 C.F.R. § 1.3, of the Commission's Rules, the request for waiver filed by High Tech on December 3, 1998, IS HEREBY GRANTED IN PART, subject to a five percent late fee, as specified above. Such late fee must be paid within ten business days after the release of this order.¹⁶ Failure to pay the late fee as specified will result in the dismissal of High Tech's application for a license in Market EA174A and will subject High Tech to the default payments set forth in section 1.2104(g) of the Commission's rules.¹⁷ This action is taken under delegated authority pursuant to section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Paul D'Ari
Chief, Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau

¹⁵ See, e.g., Clearcall, Inc., *Order*, 12 FCC Rcd. 965, 971 (WTB 1997). The Wireless Telecommunications Bureau found that the amounts of the applicant's bids (which would have been different depending on its status) may have affected the "actions, bidding strategies, and bids of other bidders." *Id.* at 970. See also *Two Way Radio of Carolina, Inc., Memorandum Opinion and Order*, FCC 99-189 (released July 22, 1999).

¹⁶ See Attachment A for payment instructions.

¹⁷ 47 C.F.R. § 1.2104(g).

MAKING PAYMENTS BY WIRE TRANSFER:

ABA ROUTING NUMBER: 043000261

RECEIVING BANK: Mellon Pittsburgh

BNF: FCC/AC—911-6106

OBI Field: (Skip one space between each information item)
"AUCTIONPAY"

TAXPAYER IDENTIFICATION NO.: (FCC Form 159, Block 25)

PAYMENT TYPE CODE: (same entry as used in FCC Form 159, Block 20A:
"APEN")

FCC CODE 1: (FCC Form 159, Block 23A: "16")

PAYOR NAME: (FCC Form 159, Block 2)

LOCKBOX NO.: (FCC Form 159, Block 1: "358850")

Please fax a completed FCC Form 159 to Mellon Bank at (412) 236-5702 at least one hour before placing the order for the wire transfer (but on the same business day).

FURTHER INFORMATION:

For questions regarding the calculation and submission of the payment, contact Gail Glasser, Office of the Managing Director, Financial Operations Division, Billings and Collections Branch, at (202) 418-1995.