

April 9, 1999
DA 99-690

John A. Prendergast, Esq.
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Dear Mr. Prendergast:

In this letter, we set forth the default payment obligations and procedures for New Wave Networks, L.L.C. ("New Wave") resulting from its failure to remit the total payment required on licenses for which it was the successful high bidder in the Local Multipoint Distribution Service ("LMDS") auction, Auction No. 17. As discussed below, New Wave is in default on its full payment obligations with respect to two B block licenses in the Basic Trading Areas ("BTAs") of Reno, Nevada, Market No. B372 and St. George, Utah, Market No. B392 and is subject to an initial default payment of \$18,068.

On March 25, 1998, the Commission concluded Auction No. 17. New Wave was the winning bidder on licenses in the following six Markets: (1) B038 (Bend, OR); (2) B144 (Flagstaff, AZ); (3) B254 (Lihue, HI); (4) B371 (Redding, CA); (5) B372 (Reno, NV); and (6) B392 (St. George, UT).¹ On March 26, 1998, the Commission announced by *Public Notice* that by April 9, 1998, winning bidders would be required to have on deposit with Mellon Bank in Pittsburgh, Pennsylvania enough funds to cover initial down payments for winning bids.² For its six B block licenses, New Wave was required to make an initial down payment equal to 20 percent of its net bids,³ or \$173,250.⁴ Prior to the commencement of the auction, New Wave had deposited with Mellon Bank an upfront payment of \$56,317. On April 9, 1998, New Wave made a payment of \$116,933 bringing its total deposits to \$173,250, the full amount owed the Commission by the down payment deadline.

¹ "LMDS Auction Closes," *Public Notice*, DA 98-572 (rel. March 26, 1998).

² *Id.*

³ The term "net bid" refers to a bidder's winning bid less any applicable bidding credits.

⁴ 47 C.F.R. 24.706(b). *See* attachment.

On July 16, 1998, the Wireless Telecommunications Bureau (the "Bureau"), under delegated authority, conditionally granted New Wave's applications for the six B block licenses.⁵ The grant of these licenses was subject to New Wave's payment by July 30, 1998, of the balance of its net bids.⁶ At the time the *Announcement Public Notice* was released, the balance due on New Wave's six licenses totaled \$693,000.⁷ On July 30, 1998, New Wave wired a payment of \$140,000. This was the last payment that New Wave made with respect to the six licenses at issue.

On August 13, 1998, New Wave filed a request seeking an extension and/or waiver of the payment deadlines.⁸ Subsequently, New Wave filed three supplements to this request.⁹ On November 6, 1998, in a *Public Notice*, the Bureau included in the upcoming LMDS Re-Auction, Auction No. 23, the six licenses for which New Wave had been the winning bidder in Auction No. 17.¹⁰ On December 9, 1998, in its third supplement, New Wave withdrew its request for waiver of the final payment deadline and, instead, requested that it be permitted to default selectively on two licenses (in Markets B372 and B392) and receive an unconditional grant of the remaining four licenses (in Markets B038, B144, B254, and B371) for which New Wave claims it has made timely and complete payment.¹¹

Under the Commission's Rules, a winning bidder that defaults after having made the

⁵ "FCC Announces the Conditional Grant of 36 Local Multipoint Distribution Service Licenses," *Public Notice*, DA 98-1401 (rel. July 16, 1998) ("*Announcement Public Notice*").

⁶ *Id.* Specifically, the Bureau explained that these grants "are conditioned upon the full and timely payment of the remaining balance of the applicant's winning bid(s) within ten (10) business days of the date of this Public Notice (i.e., by July 30, 1998)."

⁷ *See* attachment.

⁸ 47 C.F.R. §§ 1.2109(a) and (c) and 101.1105(b). Final Payment for LMDS Licenses, filed by John A. Prendergast (counsel for New Wave) on August 13, 1998.

⁹ Supplement to Request for Waiver and/or Extension of Deadline, filed by John A. Prendergast and D. Cary Mitchell on September 2, 1998; Second Supplement to Request for Waiver and Request for Confidentiality, filed by John A. Prendergast and D. Cary Mitchell on October 9, 1998; Third Supplement to Request for Waiver, filed by John A. Prendergast and D. Cary Mitchell on December 9, 1998.

¹⁰ "Local Multipoint Distribution Service Spectrum Re-Auction of 168 Licenses Scheduled for April 27, 1999; Application Filing Deadline Set for March 29, 1999," *Public Notice*, DA 98-2266 (rel. November 6, 1998).

¹¹ Third Supplement to Request for Waiver, filed by John A. Prendergast and D. Cary Mitchell on December 9, 1998. *See also* Request for Waiver of Rule Sections 101.1105(b) and 1.2109(a)-(c), filed by John A. Prendergast and D. Cary Mitchell on March 26, 1999. Because New Wave's waiver request was withdrawn, we will return, under separate cover, the materials related to that request for which New Wave sought confidentiality.

required down payment is subject to default payment obligations.¹² Specifically, such bidder is required to pay the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission (so long as the subsequent winning bid is less than the amount bid), plus an additional payment equal to three percent of the defaulter's bid or the subsequent winning bid, whichever is less.¹³ In the event that the subsequent winning bid is greater than or equal to the defaulted bid, the total default payment is equal to three percent of the defaulted bid.¹⁴ Upfront and down payment amounts on deposit with the Commission are first applied to default payments before being applied to payments owed on other licenses the bidder seeks to acquire.¹⁵

The purpose of 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 reauction of the spectrum) even if the winning bidder defaults or is determined to be disqualified and is never issued a license.¹⁶ 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 a change in the market between the acceptance of the winning bid and the grant of the license. A licensee 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.

New Wave's second payment of \$140,000, made on July 30, 1998, was insufficient to cover the full amount due by that date (\$693,300) for all six licenses that it had won. When the Commission has allowed selective default on licenses, the winning bidder has remained responsible for default penalties.¹⁷ We find that the amount on deposit after New Wave's second payment was sufficient to pay for four licenses and that New Wave is in default on two licenses in

¹² See 47 C.F.R. § 1.2109(c), § 24.704, and § 1.2104(g)(2).

¹³ 47 C.F.R. § 24.704.

¹⁴ *Id.*

¹⁵ 47 C.F.R. § 1.2106. See also Letter from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, to Kenneth Hobbs, C.H. PCS, Inc., DA 97-260 (rel. February 4, 1997) and "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly," *Public Notice*, DA 96-481, 11 FCC Rcd 10853 (1996).

¹⁶ 47 C.F.R. § 1.2104(g)(2).

¹⁷ See, e.g., Tel-Com Wireless Cable TV Corporation, *Order*, DA 97-1100 (rel. May 23, 1997); Wireless Telecommunications, Inc., *Order*, DA 97-1101 (rel. May 23, 1997); Letter to Stephen Kaffee, counsel for Entertainment Unlimited, Inc., from Amy J. Zoslov, Chief Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 99-520 (rel. March 17, 1999).

the BTAs of Reno, Nevada, Market B372 and St. George, Utah, Market B392. Thus, New Wave is subject to the default payment provisions specified in Sections 24.704 and 1.2104(g)(2) of the Commission's Rules.¹⁸

Because the licenses for Markets B372 and B392 will be included in Auction No. 23, which is scheduled to begin on April 27, 1999, we cannot, at this time, determine the full amount of the default payment owed by New Wave. Therefore, pursuant to Commission practice, we will assess a deposit toward the default payment ultimately owed by New Wave¹⁹ amounting to three percent of New Wave's net bid on each of the two licenses.²⁰ Specifically, for defaulting on license B372, we require that New Wave pay \$14,124, which represents three percent of its net bid of \$470,800.²¹ For defaulting on license B392, we require that New Wave pay \$3,944, which represents three percent of its net bid of \$131,450.²² New Wave is, therefore, assessed an initial total default penalty of \$18,068.²³ If an additional payment is required following Auction No. 23, a second Order will assess the amount due.

The record shows that New Wave currently has on deposit with the Commission \$313,250, which is the sum of New Wave's \$140,000 second payment and the \$173,250 amount previously paid to satisfy its down payment obligation for all six licenses.²⁴ Pursuant to Sections 1.2106(e) and 1.2104(g) of the Commission's Rules, the \$18,068 initial default penalty will be deducted from the \$313,250 amount on deposit, leaving a balance of \$295,182.²⁵ This \$295,182 on deposit is sufficient to satisfy New Wave's full payment obligation of \$264,000 for the four licenses in Markets B038, B144, B254 and B371.²⁶ Therefore, these licenses will not be available in Auction No. 23 and the Commission will retain the remainder of New Wave's deposit

¹⁸ 47 C.F.R. §§ 24.704 and 1.2104(g)(2).

¹⁹ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994), 2382-83, ¶¶ 195-197; "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly," *Public Notice*, DA 96-481, 11 FCC Rcd 10853 (1996).

²⁰ 47 C.F.R. §§ 24.704 and 1.2104(g).

²¹ See attachment.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ 47 C.F.R. §§ 1.2106(e) and 1.2104(g). See attachment.

²⁶ See attachment.

(\$31,182) pending assessment of the full default payment at the close of the auction.²⁷

Accordingly, New Wave's request that the Commission apply its monies on deposit to four select licenses is hereby granted. New Wave is assessed an initial default payment on licenses B372 and B392 in the amount of \$18,068, and these licenses are hereby cancelled. Having satisfied its initial default payment, New Wave will be eligible to bid in Auction No. 23. However, New Wave will be subject to the balance of the payment specified in Sections 24.704 and 1.2104(g) once licenses B372 and B392 are auctioned and the actual default payments for the licenses are determined.²⁸ Further, the licenses for the following four Markets will not be available in Auction No. 23: B038 (Bend, Oregon), B144 (Flagstaff, Arizona), B254 (Lihue, Hawaii), and B371 (Redding, California).

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

Sincerely,

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

²⁷ *Id.*

²⁸ 47 C.F.R. §§ 24.704 and 1.2104(g)(2).

Attachment

Licenses Won:

<u>Market No.</u>	<u>Net Bid</u>	<u>Down Payments Due</u>	<u>Final Payments Due</u>
B038	52,250	10,450 (20% of net bid)	41,800 (80% of net bid)
B144	188,650	37,730 (20% of net bid)	150,920 (80% of net bid)
B254	7,700	1,540 (20% of net bid)	6,160 (80% of net bid)
B371	15,400	3,080 (20% of net bid)	12,320 (80% of net bid)
B372	470,800	94,160 (20% of net bid)	376,640 (80% of net bid)
B392	131,450	26,290 (20% of net bid)	105,160 (80% of net bid)
Total:	866,250	173,250	693,000
Total Due:		173,250	693,000
Total Paid:		173,250	140,000

Defaulted Licenses:	<u>Net Bid</u>	<u>Default Penalty</u>
B372	470,800	3% of 470,800 = 14,124
B392	131,450	3% of 131,450 = 3,944
		Total: 18,068

Remaining Licenses:	<u>Net Bid</u>
B038	52,250
B144	188,650
B254	7,700
B371	15,400
Total:	264,000

Summary of Deposits:

Down Payment Made:	173,250
Final Payment Made:	140,000
Total:	313,250

Summary of Charges:

Total Amount on Deposit:	313,250
3% Default Penalty for B372:	14,124
3% Default Penalty for B392:	3,944
Total:	295,182

Remaining Amount on Deposit: 295,182 - 264,000 = **31,182**