



Federal Communications Commission
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Jonathan D Blake, Esq.
Lee J Tiedrich, Esq.
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, D.C. 20004

Robert J Rim, Esq.
Steven A. Lancellotta, Esq.
Rim, Coran & Lancellona
1350 Connecticut Avenue NW
Suite 900
Washington, D.C. 20030

Re: Joint Requests and Emergency Supplement Seeking to
Allow Pacific Telesis Enterprises to Amend FCC Form 175-M

Dear Counsel:

This letter is in reference to the requests filed on behalf of Pacific Telesis Enterprises ("PTE"), Transworld Holdings, Inc. ("**Transworld**") and **BayArea**, Inc. ("**BayArea**"). with respect to PTE's short-form application (FCC Form 175-M) to participate in the Multipoint Distribution Service ("MDS") auction. Specifically, the parties request that the Commission accept a correction to certifications and disclosures relating to a joint bidding agreement among PTE, Transworld and **BayArea** and an underlying transaction agreement affecting the parties. For the reasons discussed herein, your requests are denied.

BACKGROUND

MDS applicants **must** file a short-form application, FCC Form 175-M, together with any required exhibits to **be** eligible to bid in the MDS auction. Section 1.2105(a)(2)(viii) of the Commission's rules requires the applicant to include "an exhibit certified as truthful under penalty of perjury identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia, or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market **structure**."¹ The rule further requires "certification under penalty

¹ 47 C.F.R. §1.2105(a)(2)(viii) (1995).

of perjury that [the applicant] has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to paragraph (a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid.

On October 10, 1995 (the short-form filing deadline), PTE, Transworld and Bay Area each filed MDS short-form applications for some of the same BTX service areas.³ The parties represent that, in Exhibit B to each application, they disclosed that the shareholders of Pacific Telesis Group ("PTG") -- PTE's parent corporation -- were negotiating to purchase the wireless cable operations of the shareholders of Transworld and Bay Area.⁴ Each applicant further stated in the application that the parties would enter into a joint bidding arrangement, should these negotiations culminate in a definitive acquisition agreement.⁵

The MDS anti-collusion rules prohibit applicants, after the short-form filing deadline, from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies or discussing or negotiating settlement agreements, with other applicants until after the winning bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the applicant's short-form application. Communications among applicants concerning matters unrelated to the MDS auction are permitted after the filing of short-form applications.⁶

Short-form applications for participation in the MDS auction may be amended under limited circumstances. Pursuant to the MDS rules, all amendments are major, except those to correct minor errors or defects, such as typographical errors, or those to reflect ownership changes or formation of bidding consortia or joint bidding arrangements specifically permitted under Section 21.953. The Commission has specified that, while applicants may make minor amendments, those who fail to correct defects in a timely manner (as specified by public notice) will have their applications dismissed with no opportunity for resubmission.

³ *Id.* § 1.2105(a)(2)(ix).

⁴ *Joint Request at 2.*

⁵ *Id.* PTG was negotiating with shareholders of Transworld and Bay Area including their principal shareholders, Transworld Telecommunications, Inc. and Videotron USA, Inc. According to the parties, the joint bidding arrangement is ancillary to the agreement for PTG to acquire the outstanding shares of capital stock of Wireless Holdings, Inc. and Videotron-Bay Area, Inc.

⁶ *Id.*

⁷ 47 C.F.R. § 21.953(a). See also 47 C.F.R. § 1.2105(c)(1) (general anti-collusion rule).

⁸ *Id.* § 21.952(c)(2).

On November 3, 1995, the Wireless Telecommunications Bureau granted a limited waiver of the disclosure, filing and anti-collusion rules, and certification requirement permitting MDS applicants to amend their short-form applications.¹ Noting widespread confusion among applicants regarding the anti-collusion rules, the Bureau stated that applicants who had, in good faith, disclosed parties with whom they were negotiating or having preliminary discussions but had not reached an agreement, arrangement or understanding prior to the filing deadline were given the opportunity to amend their short-form applications to reflect such joint bidding arrangements until 5:30 p.m. on November 9, 1995. If no agreement was reached by that deadline, applicants were required to cease all discussions and negotiations with such parties relating to their bids or bidding strategies, winning bidders submitted their down payments, as required by Section 21.953(a).²

According to the parties, on November 9, 1995, the stockholders of Transworld and Bay Area accepted the offer of PTG regarding the acquisition of their wireless cable operations.³ Transworld and Bay Area amended their short-form applications on November 9 to disclose the joint bidding arrangement with PTE and to certify as to the truthfulness of their disclosures.⁴ PTE, however, filed an amendment on November 9 declaring that the parties had not concluded the acquisition agreement and that, consequently, it had no joint bidding arrangement with Transworld and Bay Area.⁵ According to the parties, they discovered, after the deadline, that the disclosures in their applications were inconsistent with each other.⁶

On November 13, 1995, PTE, Transworld and Bay Area jointly petitioned the Commission to amend PTE's short-form application.⁷ The parties seek to amend the PTE short-form application to reflect the creation of a joint bidding arrangement with Transworld and

¹ Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and the Instructional Television Fixed Service and the Implementation of Section 309(j) of the Communications Act, Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253, Order, DA 95-2292 (released November 3, 1995) ("MDS Waiver Order").

² *Id.*

³ *Joint Request* at 3.

⁴ *Id.* Transworld and Bay Area represent that, due to technical difficulties, they failed to amend their short-form applications electronically, but hand-delivered their manual amendments to the Office of the Secretary before the deadline. *Id.*, n. 3. Manually-filed amendments are permissible under such circumstances.

⁵ *Id.* at 3-4.

⁶ *Joint Request* at 3.

⁷ *Joint Request*. In an attachment, PTE individually requested similar relief. *id.*, Attachment A.

Bay Area.⁵ Contingently, the parties request a waiver of the Commission's application, certification and disclosure rules, Sections 12105(a)(2)(vii)-(ix) and 121952(e) to permit such amendment.⁶

On November 21, 1995, PTE, Transworld and Bay Area jointly filed an emergency supplement to its joint request.⁷ In this supplemental filing, the parties request a ruling that it would not be a violation of the anti-collusion rules for them to treat as legally effective the acquisition of the wireless cable operations of Transworld and Bay Area shareholders by PTG in agreement that, according to the parties, included the written joint bidding agreement between PTE and the shareholders of Transworld and Bay Area. Finally, the parties request a ruling that, if the joint bidding arrangement is nullified, certain communications among the parties regarding the acquisition (and unrelated to the ancillary joint bidding arrangement) would not violate the Commission's anti-collusion rules.⁸

DISCUSSION

In their pleadings, the parties contend that two agreements were reached by 5:30 p.m. on the November 9 deadline -- the sale of assets by the shareholders of Transworld and Bay Area to PTG, and an ancillary joint bidding arrangement among PTE, Transworld and Bay Area. However, they admit that PTE failed to disclose by the November 9 deadline established in the MDS Waiver Order that the parties had entered into agreements; in fact, PTE disclosed that no agreement was reached. The Commission's MDS auction rules and the MDS Waiver Order required the parties to agree in principle on all material terms before the filing deadlines and make the appropriate disclosures on their short-form applications and amendments thereto. Since PTE failed to make the necessary timely disclosure of the agreements assuming the agreements existed prior to the November 9 filing deadline, PTE cannot now amend its short-form application to reflect that fact unless it is granted another waiver. Moreover, it would be inconsistent with the anti-collusion rules to allow the parties to engage in otherwise prohibited discussions and carry out a joint bidding arrangement if PTE was allowed to correct its short-form applications.

⁵ *Id.* at 1-2.

⁶ *Id.* at 2. PTE does not seek a waiver of the Commission's anti-collusion rules (§§ 12105(c)(1) and 121953(a)-(b)) because, PTE contends, it has not discussed, disclosed, cooperated or otherwise collaborated with any party concerning its bids or bidding strategy, nor have any impermissible discussions or negotiations taken place after the November 9, 1995 deadline. *Id.*, Attachment A at 1.

⁷ *Emergency Supplement* at 1, n. 1.

⁸ *Emergency Supplement* at 34. The parties state that they are willing to certify the purported joint bidding arrangement is null and void, assuming the Commission grants this relief. *Id.* at 4.

⁹ *Emergency Supplement* at 4.

The parties seek a waiver of our rules to permit correction of PTE's short-form application to reflect either the **existence of the joint bidding agreement** and the acquisition agreement, or the nullification of the Joint bidding agreement. A waiver, the parties argue, is in the public interest because: (1) It would correct an inconsistency in the disclosures on the short-form applications filed by PTE, Transworld and Bay Area; (2) correcting this inconsistency would allow the auction to proceed; (3) the inconsistency was disclosed in a timely manner; (4) the parties have had no discussions in violation of the Commission's anti-collusion rules. Finally, PTE contends, this situation is **unique** and is unlikely to reoccur.²⁰

The Commission may waive its rules in whole or in part for good cause shown.²¹ In the context of our MDS auction rules, the Commission will not grant a waiver of its rules unless: (1) The underlying purpose of the rule would not be served or would be frustrated by its application in the particular case and grant of the waiver is otherwise in the public interest or (2) the **unique** facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest.²² PTE has not persuaded us that a waiver is warranted under these circumstances.

Essentially, PTE is asking us to waive the MDS filing deadline again, **solely** to accommodate PTE's failure to file a correct amendment by November 9, 1995. As we noted, the Commission previously granted all MDS applicants a partial waiver of its disclosure and anti-collusion rules and extended the resubmission deadline to allow applicants to make such disclosures.²³ The Commission determined that the underlying purpose of the MDS anti-collusion rules -- to enhance the **competitiveness** of the MDS auction process and of the post-auction market structure -- was not frustrated by a grant of a waiver to participants because the waiver expired before the start of the auction. Applicants, therefore, would not be permitted to have agreements, arrangements or understandings without disclosing them. In the *MDS Waiver Order*, we stated: "We do not believe that disqualifying applicants who, in good faith inadvertently violated the anti-collusion rules, would further the public interest. The public interest is best served by having as many competitive applicants bidding on the MDS licenses as possible."²⁴

In contrast to our stated rationale for granting the general MDS waiver, PTE has failed to provide a rationale for granting its specific waiver request. Not only has the auction begun, but nothing in PTE's pleading indicates that it is precluded from participating as a bidder. Thus, the **competitiveness** of the MDS auction, which the anti-collusion rule is designed to

²⁰ *Joint Request* at 6.

²¹ 47 C.F.R. § 1.3. See also *Northeast Cellular T&phone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

²² *MDS Waiver Order*, *supra*.

²³ *Id.*

²⁴ *Id.*

preserve, is unaffected by denial of the waiver. Moreover, unlike the general waiver which expired before the start of the MDS auction, grant of PTE's waiver request at this stage would encourage other parties to seek similar relief during the remainder of the auction. The anti-collusion rules, therefore, could be seriously undermined. Nor do we agree that PTE's situation is unique. PTE was aware of the Commission's previous waiver and could have foreseen the situation that it now confronts. PTE's dilemma was avoidable, as demonstrated by the fact that other bidders (including Transworld and Bay Area) filed accurate amendments to their applications by the applicable deadline.²⁵ PTE's waiver request is therefore denied.

We note, however, that it was incumbent on PTE to bring this matter to the attention of the Commission as it did. Section 1.65 of the Commission's rules requires an applicant to maintain the accuracy and completeness of information furnished in its application. However, this does not relieve PTE of its obligation to comply with our certification requirements and anti-collusion rules. Pursuant to our rules, the parties will, therefore, be prohibited from cooperating, collaborating, discussing, or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements with other applicants until after the winning bidder makes the required down payment. The parties may, however, discuss matters that are unrelated to the MDS auction.²⁶

In this regard, we further note that while we do not determine whether the parties actually reached either a joint bidding agreement or an acquisition agreement before the November 9 deadline, this ruling does not affect the terms of the agreements to the extent that they may be carried out in a manner consistent with the anti-collusion rules or after down payments are made. Thus, it would appear that the severable joint bidding agreement, as the parties point out, may not be performed since it could not be carried out consistent with the anti-collusion rules. On the other hand, communications regarding Securities and Exchange Commission (SEC) filings and press releases, as referred to in your request, as well as other matters unrelated to the MDS auction, would not necessarily contravene the Commission's anti-collusion rules. Thus, if the parties comply with the prohibition on discussions pertaining to bids, bidding strategies, and settlements, and participate in the auction independently of each other, they may treat the acquisition agreement as legally effective and binding to this extent.

²⁵ See First Auction of Interactive Video and Data Service (IVDS) Licenses. Request for Waiver of Applications Deadline, 10 FCC Rcd 5415 (1995).

²⁶ See 47 C.F.R. § 21.953(a).

Accordingly, based on the above, the parties' joint requests ARE DENIED Pursuant to Section 1.65 of the Commission's rules, such requests will be Incorporated with and made pan of PTE's short-form application

Sincerely\


Kathleen O' Brien Ham
Chief, Auctions Division
Wireless Telecommunications Bureau