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Federal Communications Commission (F.C.C.)

Letter

MR. MARK GRADY

PRESIDENT

DA 96-587
April 16, 1996

Mr. Mark Grady
President
Communications Venture PCS Limited Partnership
19066 Market Street
New Paris, Indiana 46553

Re: Request for Emergency Waiver of the Commission's Rules to Enable PCS C Block Applicants to Communicate with Inactive Applicants

Dear Mr. Grady:

This letter responds to the "Request for Emergency Waiver of the Commission's Rules to Enable PCS C Block Applicants to Communicate with Inactive Applicants" ("Waiver Request") filed on behalf of Communications Venture PCS Limited Partnership ("CVC") on February 28, 1996. CVC requests a waiver of Section 1.2105(c) of the Commission's rules, 47 C.F.R. s 1.2105, to permit it and other active broadband PCS "C block" participants to seek investment from control groups of applicants that are no longer eligible to participate in the auction.

Requests for waiver of rules in the broadband PCS C block auction must meet the requirements of Section 24.819 of the Commission's rules. [FN1] Under this rule, a waiver will not be granted unless an affirmative showing is made:

(i) that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or

(ii) that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative. [FN2]

Because CVC's request fails to meet the above criteria, we are denying it.

The competitive bidding anti-collusion rule, Section 1.2105(c), requires an applicant to identify on its short-form application all parties with which it has entered into a bidding consortium or other joint bidding arrangement. After the short-form filing deadline, applicants may not discuss the substance of their bids or bidding strategies with bidders, other than those identified on the short-form application, that are bidding in the same geographic license

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 areas. [FN3] For purposes of the Commission's anti-collusion rule, the term applicant includes the entity submitting the application, owners of 5 percent or more of the entity, and all officers and directors of the entity. [FN4]

There are three exceptions to the prohibition against discussions among applicants after the filing of short-form applications. First, an applicant may modify its short-form application to reflect the formation of bidding consortia or changes in ownership at any time before or during the auction, as long as the changes do not result in a change of control of the applicant, and the parties forming the bidding consortia have not applied for licenses in any of the same geographic license areas. [FN5] Second, applicants may make agreements to bid jointly for licenses, so long as the applicants have not applied for licenses in any of the same geographic license areas. [FN6] Third, a holder of a non-controlling attributable interest in an applicant may acquire an ownership interest in, or enter into a bidding agreement with, other applicants in the same geographic license area, if (1) the owner of the attributable interest certifies that it has not communicated and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest or with which it has a bidding agreement; and (2) the arrangements do not result in any change of control of an applicant. [FN7]

Unless an applicant meets one of these exceptions, it may not discuss matters relating to bidding with other applicants. Even when an applicant has withdrawn its application during the course of the auction, the applicant may not enter into a bidding agreement with another applicant bidding on the geographic license areas from which the first applicant withdrew. [FN8]

CVC indicates that it wishes to communicate with parties that hold controlling interests in C block applicants that have withdrawn from the auction in order to discuss their interest in investing in CVC. CVC states that many of the C block applicants that have withdrawn from the auction may have done so because their financial resources are limited. CVC further contends that the combined financial resources of the active and inactive C block applicants could enable the active applicants to remain competitive in the auction, and that the resulting vigorous and competitive auction would clearly serve the public interest. CVC acknowledges that "[c]onceivably, the concern exists that applicants or their controlling parties could adversely affect the auction process if they could join forces after the filing of short-form applications and avoid bidding against one another." CVC argues, however, that this concern has validity only when the parties are still active auction participants, and that "[a]fter an applicant is no longer eligible to bid in the auction independently, the prohibition against communication does not serve as a deterrent to collusion, but rather stifles the competitive nature of the auction itself." CVC argues that granting a waiver of the anti-collusion rule in this case is in the public interest because it will foster a more competitive auction.

The underlying purpose of Section 1.2105(c) is to serve as a prudent deterrent to collusion while having only a minimal and temporary effect on bidders' flexibility to pool capital and expertise. [FN9] CVC has failed to show that the underlying purpose of the anti-collusion rule will not be served by applying it to communications between active C block bidders and former C block bidders. In the Fourth MO&O, the Commission specifically considered the

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argument that permitting communication during the auction between active and non-active bidders could enable smaller applicants to pool their resources to win licenses. The Commission identified two risks to relaxing the rule -- pressure on smaller bidders to withdraw from the auction to team up with larger bidders and sham applications filed to demand payment from other applicants -- and concluded that the risks involved outweighed the benefits. CVC claims only that there is little risk of collusion if its request is granted but provides no support for that assertion. It does not address the specific risks identified by the Commission and thus fails to show that, on balance, granting its waiver request serves the public interest. In any event, after the first down payments are made, all auction participants are free to communicate among themselves, and may then discuss such matters as pooling their resources.

For the reasons stated above, **CVC's** waiver request IS HEREBY DENIED. This action is taken pursuant to delegated authority under Section 0.331 of the Commission's rules, 47 C.F.R. s 0.331.

Sincerely,

Kathleen O'Brien Ham
Chief
Auctions Division
Wireless Telecommunications Bureau

FN1. 47 C.F.R. s 24.819.

FN2. 47 C.F.R. s 24.819 (a) (i), (ii).

FN3. 47 C.F.R. s 1.2105(c) (1); Fourth Memorandum Opinion and Order in PP Docket No. 93-253, 9 FCC **Rcd** 6858, 6868 (1994) ("Fourth **MO&O**").

FN4. 47 C.F.R. s 1.2105(c) (6) (i).

FN5. 47 C.F.R. s 1.2105(c) (2).

FN6. 47 C.F.R. s 1.2105(c) (3).

FN7. 47 C.F.R. s 1.2105(c) (4).

FN8. Fourth MO&O, 9 FCC **Rcd** at 6867.

FN9. Fourth MO&O, 9 FCC **Rcd** at 6867.

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