

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

In the Matter of )  
 )  
TWO WAY RADIO OF CAROLINA, INC. )  
 )  
Request for Waiver of )  
47 C.F.R. § 1.1205(b)(2) )

**ORDER**

Adopted: January 21, 1997

Released: January 21, 1997

By the Chief, Wireless Telecommunications Bureau:

**I. Introduction**

1. Two Way Radio of Carolina, Inc. ("Two Way Radio") has filed a Petition for Reconsideration<sup>1</sup> of the denial of its request to change its designated entity status in connection with the 900 MHz Specialized Mobile Radio ("SMR") auction. Two Way Radio initially claimed eligibility as a small business (*i.e.*, an entity with gross revenues of not more than \$15 million). After the completion of the auction, Two Way Radio filed a waiver request seeking to change its status to a small business with gross revenues of not more than \$3 million and to receive the installment payment plan afforded such entities.<sup>2</sup> By a letter ruling, dated July 30, 1996, the Auctions Division ("Division") of the Wireless Telecommunications Bureau ("Bureau") denied Two Way Radio's Waiver Request.<sup>3</sup> For the reasons set forth below, Two Way Radio's reconsideration petition is denied and the Division's decision is affirmed.

**II. Background**

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<sup>1</sup> Two Way Radio of Carolina, Inc., Petition for Reconsideration, Request for Waiver of Section 1.1205(b)(2) of the Commission's rules (filed Aug. 29, 1996) ("Petition").

<sup>2</sup> Two Way Radio of Carolina, Inc., Request for Waiver, Application of Two Way Radio of Carolina, Inc. for Authority to Construct and Operate a CMRS Station in the 900 MHz Band (filed Apr. 29, 1996) ("Waiver Request").

<sup>3</sup> See Letter to Terry J. Romine, Esquire and Pamela Gaary, Esquire, Counsel for Two Way Radio, from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau (July 30, 1996) ("Division Letter").

2. On September 15, 1995, the Commission issued a Public Notice announcing the start of the 900 MHz SMR auction on November 28, 1995. The Public Notice further provided that the short-form applications (FCC Form 175) were due on October 26, 1995, and that applicants were required to indicate their designated entity status on the short-form application.<sup>4</sup> Pursuant to Section 90.814 of the Commission's rules,<sup>5</sup> there were two categories of small businesses for that auction: (1) entities with average gross revenues of not more than \$3 million for the three preceding years, and (2) entities with average gross revenues of not more than \$15 million for the three preceding years. Bidders within the first category were eligible for a larger bidding credit and a more favorable installment payment plan than bidders within the second category.<sup>6</sup> Two Way Radio indicated on its short-form application that it was a small business with gross revenues of not more than \$15 million.

3. On April 15, 1996, the Commission concluded the 900 MHz SMR auction. Two Way Radio was the winning bidder for Licenses YS006G and YS006T in the Charlotte, North Carolina Major Trading Area. After the close of the 900 MHz SMR auction, Two Way Radio filed a request with the Division to permit Two Way Radio to claim eligibility as a small business with average gross revenues of not more than \$3 million.<sup>7</sup> In its Waiver Request, Two Way Radio claimed that because the Commission did not allow sufficient filing time it was unable to complete an audit of its income before the short-form application filing deadline.<sup>8</sup> Two Way Radio also contended that a more accurate representation of its financial records showed that it qualified as a small business with average gross revenues of not more than \$3 million.<sup>9</sup> Two Way Radio further claimed that because its proposed amendment was minor, it was entitled to make such a change

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<sup>4</sup> See *Public Notice*, Report No. AUC-95-07, Auction No. 7, released Sept. 15, 1995. The auction actually commenced on December 5, 1995. *Public Notice*, Mimeo No. 60654, released Nov. 13, 1995, announced a change in the start of the auction to December 4, 1995, in the event of a government-wide shutdown. A further *Public Notice*, released Nov. 20, 1995, announced that the auction would commence on December 5, 1995.

<sup>5</sup> 47 C.F.R. § 90.814.

<sup>6</sup> 47 C.F.R. §§ 90.810 and 90.812. Under the rules, an entity having no more than \$3 million in gross revenues was entitled to: (i) use a bidding credit of 15 percent to lower the cost of its winning bid; (ii) make interest-only payments for five years, with interest to accrue at the U.S. Treasury note rate, and payments of interest and principal to be amortized over the remaining five years of the license term. An entity having gross revenues of not more than \$15 million was entitled to: (i) a bidding credit of 10 percent to lower the cost of its winning bid; (ii) interest-only payments for the first two years of the license term, with interest to accrue at the U.S. Treasury note rate plus an additional 2.5 percent, and payments of interest and principal to be amortized over the remaining eight years of the license term.

<sup>7</sup> Waiver Request at 1.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 3.

pursuant to Section 1.2105(b)(2) of the Commission's rules.<sup>10</sup>

4. The Division denied Two Way Radio's Waiver Request finding that, because of the significant benefits that the two small business categories confer on bidders, a modification to an applicant's small business status does not constitute a minor change within the meaning of Section 1.2105(b)(2) of the Commission's rules. The Division also stated that a waiver of Section 1.2105(b)(2) to allow the amendment was not justified because Two Way Radio failed to show that "unique circumstances are involved and that there is no reasonable alternative solution within existing rules," as required by Section 90.151 of the Commission's rules.<sup>11</sup> Finally, the Division stated that the 42-day period between the announcement of the 900 MHz SMR auction and the short-form filing deadline provided adequate time for Two Way Radio to review its financial records in order to prepare its application.<sup>12</sup>

### **III. Arguments of Two Way Radio**

5. In its Petition, Two Way Radio seeks to amend its status as a small business with average gross revenues of not more than \$15 million to a small business with average gross revenues of not more than \$3 million and to obtain all financial benefits afforded such small businesses. In the alternative, it requests only the ability to make installment payments under the more favorable plan afforded small businesses with average gross revenues of not more than \$3 million.<sup>13</sup> Two Way Radio raises three principal arguments. First, Two Way Radio contends that in preparing its long-form application (FCC Form 600), it realized that the information in its FCC Form 175 was incorrect and that, pursuant to Section 1.65(a) of the Commission's rules, it was obligated to ensure that its pending application remained accurate.

6. Second, Two Way Radio contends that its amendment is minor under Sections 1.1205(b)(2) and 90.164 of the Commission's rules. In support of this contention, Two Way

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<sup>10</sup> *Id.* at 4. Section 1.2105(b)(2) of the Commission's rules provides:

The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. Form 175 may be amended or modified to make minor changes or correct minor errors in the application (such as typographical errors). The Commission will classify all amendments as major or minor, pursuant to rules applicable to specific services. An application will be considered to be a newly filed application if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

<sup>11</sup> Division Letter at 2.

<sup>12</sup> The Division's letter inadvertently stated that Two Way Radio was the winning bidder for license YSMO11T, instead of licenses YS006G and YS006T. This error has no impact on the issues raised in Two Way Radio's Petition for Reconsideration.

<sup>13</sup> Petition at 3.

Radio claims that its change in small business status should be granted because it will not affect any other parties.<sup>14</sup> Two Way Radio further contends that allowing the amendment will further Congressional and Commission goals to provide opportunities for small business to enter the wireless telecommunications industry and potentially provide additional competition to the marketplace.<sup>15</sup> Two Way Radio states if its status is not changed, Two Way Radio will lose its ability to compete as well as its flexibility to introduce additional services to consumers. Two Way Radio contends that this change will not adversely affect any other party because the bidding is completed "and the manner in which a certain bidder will pay its high bid has no affect on other applicants."<sup>16</sup> Two Way Radio further contends that the fact that higher bids were made for other blocks in the market at issue after Two Way Radio's winning bids were entered shows that Two Way Radio's status was not a determining factor in the results of the auction.<sup>17</sup>

7. Third, Two Way Radio reiterates that the time provided to file the short-form application was insufficient and its mistake in calculating gross revenues was caused by its desire to meet that deadline. Two Way Radio argues that the Bureau should consider its size (and small staff) and its available resources in making a decision in this case.<sup>18</sup> Two Way Radio further states that the hardship it will incur if its relief is not granted outweighs the benefit to the government in not permitting the change in status.<sup>19</sup> Two Way Radio also argues that the Bureau should follow the practice of the Internal Revenue Service ("IRS") to refund overpayments by a taxpayer, even if such overpayments were caused by the taxpayer's mistake of fact or law.<sup>20</sup>

#### **IV. Discussion**

8. We agree with the Division's decision to deny Two Way Radio's change of eligibility status. As the Division correctly noted, because of the significant benefits that the two small business categories confer on winning bidders, modification of an applicant's small business status does not constitute a minor change within the meaning of Section 1.2105(b)(2) of the Commission's rules. Section 90.164 provides, in relevant part, that:

In general, a major filing is a request for Commission action that has the potential to affect parties other than the applicant.

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<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.* at 7.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.* at 11.

<sup>20</sup> *Id.* at 10.

The rule then lists the following as major filings: (a) initial station authorization; (b) substantial change in ownership or control; (c) renewal of authorizations; (d) having a significant environmental effect; (e) Specialized Mobile Radio Service filings which request or change various engineering/technical matters, such as a request to a change a frequency, increase in effective radiated power or antenna height, relocating an existing fixed transmitter, change a requested frequency, and other types of specified engineering/technical matters.<sup>21</sup>

9. The minor changes contemplated by the rule, such as typographical errors, can be undertaken by a bidder without any action on the part of the Commission. Here, Two Way Radio is seeking a change that requires the Commission to afford it different benefits. We do not believe that this type of change is one contemplated by the rule. Moreover, the fact that Two Way Radio is required, pursuant to Section 1.65(a) of the Commission's rules, to maintain the accuracy and completeness of information furnished in an application does not transform an otherwise major change into a minor one.

10. We also disagree with Two Way Radio's contention that its proposed amendment is minor because it does not affect any other parties. Bidders placed bids during the auction based upon their understanding that Two Way Radio was entitled to a 10 percent bidding credit. The amount of Two Way Radio's bids may have affected the actions, bidding strategies, and bids of other bidders. The fact that there were higher bids in the markets after Two Way Radio submitted its winning bids is not dispositive that its filing status did not affect the actions of other bidders. In addition, we believe that providing Two Way Radio with the benefit of a more favorable bidding credit arrangement after the close of the auction would affect other bidders as well as the integrity of the auction process. Moreover, we also believe that Two Way Radio's reliance on the IRS's tax refund policy for overpayments is misplaced. A taxpayer's change in status has no effect on the obligations of other taxpayers, unlike a bidder's change in status. Bidders are interdependent because bids of one bidder have a direct effect on the bidding strategies of other bidders. We believe that a more appropriate analogy to the IRS's tax refund policy is the Commission's own policy of refunding overpayments by bidders.<sup>22</sup>

11. In this vein, we also reject Two Way Radio's alternative request that it be entitled to a more favorable installment payment plan. The installment payment plan, which a bidder is entitled to receive based upon its designated entity status, affects the bidder's valuation of the license and

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<sup>21</sup> 47 C.F.R. § 90.164.

<sup>22</sup> "We will hold all upfront payments until after the auction to which they apply, but as soon as possible we will return the upfront payments of bidders that are not auction winners, are not subject to withdrawal or default penalties, and do not wish to bid for licenses that are to be re-auctioned." *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order* ("Second Report and Order") in PP Docket No. 93-253, 9 FCC Rcd 2348, 2380 (1994), *recon. granted in part, Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994). *See also Report and Order* in PP Docket No. 93-253, 10 FCC Rcd 9589, 9652 (1995) ("To the extent that any upfront payment [of winning bidders] not only covers, but exceeds, the required down payment, the Commission will refund any excess amount after determining that no bid withdrawal payments are owed by the bidder.").

its bids and, consequently, the bids of other bidders during an auction. Thus, making a post-auction change to Two Way Radio's installment payment plan is unfair to other bidders in the auction and would compromise the integrity of the competitive bidding process.

12. Finally, we believe that the 42-day period within which to prepare and file applications for this auction provided adequate time to review financial records. Two Way Radio contends there were actually 34 days, and not 42, to prepare and file applications based upon the date of publication of the Public Notice in the Federal Register.<sup>23</sup> We find that even 34 days is sufficient time to prepare and file applications and is consistent with the filing windows in other proceedings.<sup>24</sup> Applicants are responsible for the correctness and completeness of their applications. We believe that the certainty in filing deadlines is significant to both the integrity and functioning of the competitive bidding process.<sup>25</sup> On balance, we believe that ensuring the integrity of the competitive bidding process outweighs the financial burdens Two Way Radio may bear as a result of its own filing error.

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<sup>23</sup> *Id.* at 8.

<sup>24</sup> *See, e.g.*, June 26, 1996, Public Notice announcing August 1, 1996, application deadline for the Broadband Personal Communications Service (D, E and F Blocks) auction (Report No. AUC-96-11-A, Auction No. 11).

<sup>25</sup> *See, e.g.*, *Second Report and Order, supra*, at 9 FCC Rcd 2350 ("... procedural and payment issues regarding announcement of auctions and the filing of applications, bidder and licensee qualifications, pre-auction upfront payment and post-auction down payment, and penalties ... are intended to ensure that the competitive bidding process is limited to serious, qualified applicants.").

## **V. Conclusion and Ordering Clause**

13. For the reasons stated above, we find that Two Way Radio has failed to show that it is entitled to the relief it requests and, thus, we find that the Division was correct in denying Two Way Radio's Waiver Request. Accordingly, IT IS ORDERED that, pursuant to Section 0.331 of the Commission's rules, the Petition for Reconsideration filed by Two Way Radio of Carolina, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Michele C. Farquhar  
Chief, Wireless Telecommunications Bureau