

March 17, 1999  
DA 99-520

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Dear Mr. Kaffee:

In this letter, we set forth the default payment obligations and procedures for Entertainment Unlimited, Inc. ("EU, Inc.") resulting from its failure to remit the total required payment on licenses for which it was the successful high bidder in the broadband Personal Communications Services ("PCS") D, E, and F block auction, Auction No. 11. As discussed below, EU, Inc. is in default on its full payment obligations for one E block license in the Basic Trading Area ("BTA") of Visalia-Porterville-Hanford, California, Market No. B458E, and is subject to an initial default payment in the amount of \$18,240.

On January 14, 1997, the Commission concluded Auction No. 11. EU, Inc. was the winning bidder on licenses in the following five markets: B397D (Salinas-Monterey, CA), B405D and B405F (San Luis Obispo, CA), B406D (Santa Barbara-Santa Maria, CA), and B458E (Visalia-Porterville-Hanford, CA).<sup>1</sup> On January 15, 1997, the Commission announced by *Public Notice* that by January 23, 1997, winning bidders would be required to have on deposit with Mellon Bank in Pennsylvania enough funds to cover (1) applicable payments for withdrawn bids, and (2) initial down payments for winning bids.<sup>2</sup> EU, Inc.'s bid withdrawal payments totalled \$120,460. For its three D block licenses and one E block license, EU, Inc. was required to make an initial down payment equal to 20 percent of its winning bids, or \$1,000,800.<sup>3</sup> For its F block license, EU, Inc. was required to make an initial down payment of 10 percent of its net winning bid, or \$85,800.<sup>4</sup> Thus, by January 23, 1997, EU, Inc. owed the Commission a total amount of \$1,207,060, which represents the initial down payment owed for all five licenses plus the

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<sup>1</sup> "D, E, and F Block Auction Closes," *Public Notice*, DA 97-81 (rel. January 15, 1997).

<sup>2</sup> *Id.*

<sup>3</sup> 47 C.F.R. § 24.706(b). The \$1,000,800 figure includes the initial down payments due for licenses in markets B397D, B405D and B406D, which were \$269,600, \$167,600, and \$442,000 respectively, as well as the initial down payment for license B458E which was \$121,600. *See* attachment.

<sup>4</sup> 47 C.F.R. § 24.706(b). *See* attachment.

withdrawal payment.<sup>5</sup> Prior to the commencement of the auction, EU, Inc. had deposited an upfront payment of \$1,000,000 with Mellon Bank, so the balance due by January 23, 1997, equaled \$207,060. EU, Inc. made a payment in this amount on January 23, 1997, bringing its total deposits (including bid withdrawal payments) to \$1,207,060, the full amount owed the Commission.

On April 28, 1997, the Wireless Telecommunications Bureau (the "Bureau"), under delegated authority, conditionally granted EU, Inc.'s applications for the five D, E, and F block PCS licenses.<sup>6</sup> The grant of these licenses was subject to EU, Inc.'s payment, by May 12, 1997, of the balance of its net bids<sup>7</sup> on the D and E block licenses (i.e., the payment of the remaining 80 percent of its net bids on the D and E block licenses), and the payment of an additional ten percent of its net bid on the F block license.<sup>8</sup> At the time the *Announcement Public Notice* was released, the balance due on EU, Inc.'s D and E block licenses equaled \$4,003,200, while the payment due on its F block license equaled \$85,800, for a total amount due of \$4,089,000.<sup>9</sup> On May 12, 1997, EU, Inc. submitted a payment of \$3,602,000. This was the last payment that EU, Inc. made with respect to any of the five licenses at issue.

On December 23, 1998, in a *Public Notice*, the Commission listed for inclusion in Auction No. 22 the five licenses for which EU, Inc. had been the winning bidder in Auction No. 11.<sup>10</sup> In a letter dated February 23, 1999, to the Auctions and Industry Analysis Division, EU, Inc. requested that the three D block licenses for markets B397D, B405D and B406D and the F block

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<sup>5</sup> The \$1,207,060 figure was calculated by adding together EU, Inc.'s initial down payment of \$1,000,800 for its D and E block licenses, \$85,800 for its F block license, and a withdrawal payment of \$120,460. ( $\$1,000,800 + \$85,800 + \$120,460 = \$1,207,060$ ). See attachment.

<sup>6</sup> "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," *Public Notice*, DA 97-883 (rel. April 28, 1997) ("*Announcement Public Notice*").

<sup>7</sup> The term "net bid" refers to a bidder's winning bid less any applicable bidding credits.

<sup>8</sup> *Announcement Public Notice* at 2. Specifically, the Bureau explained that "[e]ach D and E block applicant will receive its individual BTA license(s) following payment of the balance of its winning bid(s). Each F block applicant will receive its individual BTA license(s) following payment for each license of the final down payment and execution and return of the note and security agreement." See also 47 C.F.R. § 24.708(a).

<sup>9</sup> See attachment.

<sup>10</sup> "Auction of C, D, E, and F Block Broadband PCS Licenses; Notice and Filing Requirements for Auction of C, D, E, and F Block Broadband Personal Communications Services Licenses Scheduled for March 23, 1999; Minimum Opening Bids and Other Procedural Issues," *Public Notice*, DA 98-2604 (rel. December 23, 1998); see also "Correction to Attachment A; Auction of C, D, E, and F Block Broadband PCS Licenses; Notice and Filing Requirements for Auction of C, D, E, and F Block Broadband Personal Communications Services Licenses Scheduled for March 23, 1999; Minimum Opening Bids and Other Procedural Issues," *Public Notice* (rel. January 21, 1999).

license for market B405F be removed from the list of licenses included in Auction No. 22.<sup>11</sup>

Under the Commission's rules, a winning bidder that defaults after having made the required down payment is subject to default payment obligations.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

EU, Inc.'s payment of \$3,602,000, made on May 12, 1997, was insufficient to cover the full amount due by that date for all five licenses that EU, Inc. had won. The record shows that EU, Inc. did not pay for one of its licenses. EU, Inc.'s FCC Form 159, which generally accompanies any payment made to the Commission and specifies the licenses for which payment is made, shows that license B458E has been crossed out. The Commission's Billings and Collections Branch, Office of the Managing Director, in telephone conversations with EU, Inc., indicated that the \$3,602,000 payment could be applied to cover only the second payments due on the D and F block licenses and not the balance owed on the E block license (B458E). In its letter to the Auctions and Industry Analysis Division dated February 23, 1999, EU, Inc. acknowledges that it did not satisfy its full payment obligations for license B458E.<sup>16</sup>

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<sup>11</sup> Letter from Stephen Kaffee, counsel for EU, Inc., to Amy Zoslov, Chief, and Mark Bollinger, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, dated February 23, 1999. In its letter, EU, Inc. asserts that it paid in full for the three D block licenses and stands ready to make any payments due on the F block license. EU, Inc. further states that it does not contest the inclusion in Auction No. 22 of the E block license for market B458E. EU, Inc. acknowledges that while it made a 20 percent down payment on that license it failed to pay the required 80 percent balance due on the license.

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

<sup>13</sup> 47 C.F.R. § 24.704.

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

<sup>15</sup> 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).

<sup>16</sup> See Letter from Stephen Kaffee, counsel for EU, Inc., to Amy Zoslov, Chief, and Mark Bollinger, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, dated February 23, 1999.

Where the Commission has allowed selective default on licenses, the winning bidder has remained responsible for default penalties.<sup>17</sup> We find that EU, Inc. is in default on the E block license in the Visalia-Porterville-Hanford, California BTA, market B458E. Although EU, Inc. paid the required initial down payment amount of \$121,600 (which represents 20 percent of its net bid of \$608,000), EU, Inc.'s subsequent payment did not cover the remaining 80 percent balance of \$486,400 owed on the license.<sup>18</sup> Thus, EU, Inc. is subject to the default payment provisions specified in Sections 24.704 and 1.2104(g)(2) of the Commission's rules.<sup>19</sup>

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.<sup>20</sup> 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.

Because the license for market B458E will be included in the next broadband PCS auction, Auction No. 22, which is scheduled to begin on March 23, 1999, we cannot, at this time, determine the full amount of the default payment owed by EU, Inc. Therefore, pursuant to Commission practice, we will assess a deposit toward the default payment ultimately owed by EU, Inc.<sup>21</sup> amounting to three percent of EU, Inc.'s net bid on the license.<sup>22</sup> Specifically, we require that EU, Inc. pay \$18,240, which is three percent of its net bid of \$608,000 for license B458E.<sup>23</sup> If an additional payment is required following Auction No. 22, a second Order will assess the amount due.

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<sup>17</sup> 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) (Video Services Division, Mass Media Bureau, permitted selective default on second down payments, subject to penalties for default.)

<sup>18</sup> See attachment.

<sup>19</sup> 47 C.F.R. §§ 24.704 and 1.2104(g)(2).

<sup>20</sup> 47 C.F.R. § 1.2104(g)(2).

<sup>21</sup> 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).

<sup>22</sup> 47 C.F.R. §§ 24.704 and 1.2104(g). See attachment.

<sup>23</sup> See attachment.

EU, Inc.'s payment to the Commission of \$1,207,060 by January 23, 1997, included an initial down payment of \$121,600 for the license in market B458E. Because EU, Inc. is in default on that license, pursuant to Sections 1.2106(e) and 1.2104(g) of the Commission's Rules, the \$121,600 down payment has been applied to EU, Inc.'s initial default payment of \$18,240, leaving a balance of \$103,360 on deposit ( $\$121,600 - \$18,240 = \$103,360$ ).<sup>24</sup> In addition to the \$103,360 amount on deposit, EU, Inc., paid \$3,602,000 on May 12, 1997. The \$3,602,000 payment, when combined with the \$103,360 on deposit is sufficient to satisfy EU, Inc.'s full payment obligations for the three D block licenses in markets B397D, B405D and B406D and its ten percent payment obligation for the F block license in market B405F,<sup>25</sup> which total \$3,602,600 ( $\$1,078,400 + \$670,400 + \$1,768,000 + \$85,800 = \$3,602,600$ ).<sup>26</sup> Therefore, we will remove these four licenses from Auction No. 22 and retain the remainder of EU, Inc.'s deposit pending our assessment of its full default payment at the close of the auction.

Accordingly, EU, Inc. is assessed an initial default payment on license B458E in the amount of \$18,240, and this license is hereby cancelled. In addition, EU, Inc. will be subject to the balance of the payment specified in Sections 24.704 and 1.2104(g) once license B458E is auctioned and the actual default payment for the license is determined.<sup>27</sup> Further, the licenses for the following four markets will be removed from Auction No. 22: B397D (Salinas-Monterey, California), B405D (San Luis Obispo, California), B406D (Santa Barbara-Santa Maria, California), and B405F (San Luis Obispo, 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

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<sup>24</sup> 47 C.F.R. §§ 1.2106(e) and 1.2104(g).

<sup>25</sup> Loan documents for license B405F will be sent to EU, Inc. under separate cover.

<sup>26</sup> See attachment.

<sup>27</sup> 47 C.F.R. §§ 24.704 and 1.2104(g)(2).

## Attachment

<u>Market No.</u>	<u>Net Bid</u>	<u>First Down Payments Due</u>	<u>Second Payments Due</u>
B397D	1,348,000	269,600 (20% of net bid)	1,078,400 (80% of net bid)
B405D	838,000	167,600 (20% of net bid)	670,400 (80% of net bid)
B406D	2,210,000	442,000 (20% of net bid)	1,768,000 (80% of net bid)
B458E	608,000	121,600 (20% of net bid)	486,400 (80% of net bid)
B405F	858,000	85,800 (10% of net bid)	85,800 (10% of net bid)
Total:		1,086,600	4,089,000
		+ 120,460 (withdrawal)	
<b>Total Due:</b>		<b>1,207,060</b>	<b>4,089,000</b>
<b>Total Paid:</b>		<b>1,207,060</b>	<b>3,602,000</b>