

DA 98-1718

Released: August 27, 1998

Robert K. Crumrine
Executive Vice President and General Manager,
PVT NetWorks, Inc.
4011 W. Main
Artesia, New Mexico 88210

Re: PVT NetWorks, Inc. Request for Reconsideration in Auction No. 17

Dear Mr. Crumrine:

This is in reference to the Petition for Reconsideration ("Petition") of PVT NetWorks, Inc. ("PVT"), requesting reconsideration of the Auctions and Industry Analysis Division's ("Division's") denial of its waiver request in the Local Multipoint Distribution Service ("LMDS") auction. PVT requests reconsideration of the Division's decision to require it to include in its gross revenues calculation the total gross revenues of two cellular partnerships in which it has an interest so that it can qualify as a "very small business" under Section 101.1112(b) and receive the corresponding 45 percent bidding credit. For the reasons explained below, PVT's petition for reconsideration is granted.

On January 18, 1998, PVT filed a short-form application to participate in the LMDS auction. In its short-form application, PVT identified itself as a rural telephone cooperative and claimed "very small business" status, entitling it to a 45 percent bidding credit. On its Exhibit C, which set forth average gross revenues for the preceding three years, PVT excluded most of the gross revenues of two cellular partnerships in which it claimed it held a minority interest and included only those revenues directly attributable to it. PVT also included a waiver request as part of its short-form application, requesting waiver of Section 101.1112(b) of the Commission's rules in the event its interests in the cellular partnerships were deemed to create an "affiliation" with those partnerships and, thus, require the inclusion of the gross revenues from each of the cellular partnerships.

In its initial waiver request, PVT sought to exclude the total gross revenues of the two cellular partnerships (New Mexico RA 6-I Partnership and New Mexico RA 6-II Partnership) from its gross revenues calculation on the basis that such partnerships were not affiliates of PVT. PVT argued its rights in those partnerships were more consistent with those of a limited partner than a general partner. Thus, it concluded that these partnerships were not affiliates

because it did not control them. In light of its alleged limited interest, PVT sought to attribute only a percentage of the gross revenues from each partnership to its gross revenue calculation -- namely, 14.285% from the New Mexico RA 6-I Partnership and 15.625% from the New Mexico RA 6-III Partnership -- in order to qualify for a 45 percent bidding credit as a very small business. Alternatively, in the event these entities were deemed to be affiliates, PVT requested a waiver of Sections 101.1112(g) and 101.1112(h) to exclude from its gross revenues calculation the full gross revenues from its interests in the two general cellular partnerships.

Based upon the Division's review of PVT's waiver request under tight pre-auction time constraints and PVT's admission that express provisions in the cellular partnership agreements identify PVT as a general partner, the Division denied the waiver request.¹ On March 5, 1998, PVT filed a petition for reconsideration.²

PVT also filed a waiver request with its long-form license application that was virtually the same as its reconsideration petition. This letter resolves all outstanding issues in the pending petition for reconsideration and long-form waiver request.

A petition for reconsideration shall state with particularity the respects in which a petitioner believes the action taken should be changed and shall specifically state the relief sought.³ Based on the record before us, we are persuaded that PVT has presented additional facts sufficient to justify grant of its petition for reconsideration. We find that the cellular partnerships are not affiliates of PVT, in that PVT neither directly nor indirectly controls, nor is it directly or indirectly controlled by, the cellular partnerships. PVT, therefore, need only include those gross revenues that flow to it directly and, consequently, qualifies as a very small business.

Section 101.1112(b) defines "very small business" in the LMDS auction as "an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$15 million." Section 101.1112(h)(1)(ii) defines the basis for affiliation, for the purpose of attributing gross revenues as required in Section 101.1112(b), and states, in part, that an entity is an affiliate of an applicant if such entity "is directly or indirectly controlled by the applicant," or "directly or indirectly controls or has the power to control the applicant."

¹ See *Letter Decision*, PVT Networks, Inc. Request for Waiver in Auction No. 17, DA 98-186 (February 3, 1998). In light of the denial of its waiver request, prior to the expiration of the re-submission period on February 3, 1998, PVT amended its short-form application electronically to reflect "small business" status in item ten, entitling it to a 35% bidding credit.

² On or about February 3, 1998 shortly after the decision was issued on PVT's initial waiver request, PVT delivered a copy of the New Mexico RA 6-I Partnership Agreement to Division staff. Subsequently, in pleadings and otherwise, PVT has confirmed that the terms and conditions of the New Mexico RA 6-I Partnership Agreement are virtually identical to the terms and conditions of the New Mexico RA 6-III Partnership Agreement. Accordingly, for convenience and ease of reference, all subsequent references in the *Order* are to the terms and conditions of the New Mexico RA 6-I Partnership Agreement.

³ 47 C.F.R. § 1.106(d)(1).

PVT's petition for reconsideration includes additional facts and copies of its partnership agreements to support its assertion that it does not control the cellular partnerships. In the letter decision, the Division disagreed with PVT's characterization of its interests as a general partnership primarily based upon PVT's admission that express provisions in the cellular partnership agreements identified it as a "general partner," and the fact that the Division did not have any other information upon which to assess other indicia of control, such as copies of the partnership agreements themselves.⁴

Upon closer examination, we conclude that PVT is not controlled by the cellular partnerships, and other provisions in each of the agreements operate to place the ability to control each of the cellular partnerships in an entity other than PVT. For example, under each partnership agreement, a separate entity other than PVT is named as the operating partner.⁵ In each agreement, the operating partner alone has the authority to control the cellular partnerships. In contrast to the rights of the operating partner, under the partnership agreements, entities identified as "partners," such as PVT, are given limited rights. PVT states that these limited rights are consistent with those which a limited partner is permitted under Article 3 of the Uniform Limited Partnership Act (1976), as amended in 1985, and adopted by the State of New Mexico.

Based upon the above and our finding that other provisions in each of the agreements operate to place the ability to control each of the partnerships in an entity other than PVT,⁶ we find that PVT neither controls, nor is controlled by, the two cellular partnerships and that they are not affiliates for purposes of calculating gross revenues under Section 101.1112. Therefore, only those revenues from these partnerships that flow directly to PVT -- namely, 14.285% from the New Mexico RSA 6-I Partnership and 15.625% from the New Mexico RSA 6-II Partnership -- must be included in PVT's gross revenues calculation. Thus, with the inclusion of only these revenues, PVT's average gross revenues are reduced from a total of \$15,872,339 to \$10,059,024 -- a figure well within the threshold for "very small business" status.

For the reasons stated above, PVT's petition for reconsideration IS HEREBY GRANTED and PVT hereby qualifies as a "very small business" under Section 101.1112(b). As such, it is entitled to a 45 percent bidding credit as the high bidder on one license, BTA B068 in Carlsbad, New Mexico, in the LMDS auction. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's Rules.

⁴ See *Letter Decision*, PVT Networks, Inc. Request for Waiver in Auction No. 17, DA 98-186 (February 3, 1998).

⁵ In the New Mexico RSA 6-I Partnership Agreement, the operating partner is identified as Contel Cellular of Southwest, Inc. In the New Mexico RSA 6-III Partnership Agreement, the operating partner is identified as Leaco Rural Telephone Cooperative.

⁶ The partnership provisions placing control with the operating partner do not contravene the Commission's definition of control expressed in *Ellis Thompson Corporation*, 9 FCC Rcd 7138 (1994)(citing *Intermountain Microwave*, 24 Rad. Reg. 983 (1963).

Sincerely,

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

cc: John Prendergast