

November 10, 1999

Mr. Jeremy Greene  
2629 Manchester Court  
Thousand Oaks, California 91362

Dear Mr. Greene:

This letter responds to your request for waiver of the Federal Communications Commission's ("Commission") competitive bidding rules, which was filed as Exhibit F to your Form 601, submitted on July 16, 1999. Specifically, you ask for waiver of the Commission's bid withdrawal payment rule, Sections 90.1007, 1.2104 (g).<sup>1</sup> For the reasons stated below we deny your request. Additionally, in the conclusion of your waiver request you make mention of a "payment plan." To the extent your request also seeks an installment payment plan, such a request is denied for the reasons stated in our *First Waiver Denial*.<sup>2</sup>

#### I. Background.

As noted in prior correspondence and decisions related to this matter,<sup>3</sup> you were a bidder in the Phase II 220 MHz Service auction (Auction No. 18). Auction No. 18 commenced on September 15, 1998 and closed on October 23, 1998.<sup>4</sup> In Round 19 of the auction, you placed the high bid on License BEA 160E, the Los Angeles-Riverside-Orange County, CA market ("License BEA 160E") in the amount of \$477,000 (net bid \$310,050.00).<sup>5</sup> However, you subsequently withdrew your bid in Round 41 and no subsequent bids were placed for the license.<sup>6</sup>

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<sup>1</sup> 47 CFR §§ 90.1007, 1.2104(g).

<sup>2</sup> Letter from Amy Zoslov, Chief, Auction and Industry Analysis Division, 13 FCC Rcd. 22,347, 22,348 (WTB 1998) ("*First Waiver Denial*").

<sup>3</sup> See In the Matter of Request for Waiver of the Competitive Bidding Rules as Set Forth in Part 1, Subpart Q of the Commission's Rules and the Bid Withdrawal Rule as Set Forth in Section 90.1007 of the Commission's Rules, *Memorandum Opinion and Order*, FCC 99-191 (rel. July 23, 1999) ("*MO&O*"); In the Matter of Request for Waiver of the Competitive Bidding Rules as Set Forth in Part 1, Subpart Q of the Commission's Rules and the Bid Withdrawal Rule as Set Forth in Section 90.1007 of the Commission's Rules, *Order*, DA 99-470, 14 FCC Rcd. 3824 (WTB 1999) ("*WTB Reconsideration Order*"); *First Waiver Denial*.

<sup>4</sup> See "Phase II 220 MHz Service Auction Closes: Winning Bidders In the Auction of 908 Phase II 220 MHz Service Licenses," *Public Notice*, DA 98-2143 (rel. October 23, 1998).

<sup>5</sup> The net bid takes into account the bidding credit that you claimed.

<sup>6</sup> See *First Waiver Denial*.

Following the close of the auction, you requested a waiver of the Commission's competitive bidding rules relative to the withdrawn bid.<sup>7</sup> Specifically, you sought the award of License BEA 160E, the establishment of an installment plan, and a reduction in the bid amount. On November 13, 1998, we denied your request on the grounds that a grant “. . . would be contrary to the most basic principles of the auction process . . . .” Thus, you were subjected to an initial withdrawal payment of 3 percent of the withdrawn bid amount<sup>8</sup> and our *First Denial Waiver* stated that you would be subject to the full withdrawal payment under the Commission's rules once License BEA 160E was sold at a subsequent auction and the full bid withdrawal payment could be determined.<sup>9</sup>

On November 17, 1998, you filed a petition for reconsideration of that decision,<sup>10</sup> which the Wireless Telecommunications Bureau (“Bureau”) denied on March 5, 1999.<sup>11</sup> On March 29, 1999, you filed an application for review with the Commission. On July 21, 1999, the Commission denied your application as you raised new issues on review that should have been presented to the Bureau.<sup>12</sup>

On June 30, 1999, the Commission completed the second Phase II 220 MHz Service spectrum auction (Auction No. 24).<sup>13</sup> Your bid in the amount of \$199,000 (net bid \$129,350)<sup>14</sup> was the winning bid on License BEA 160E.

## II. Discussion.

Section 1.925(b) provides that a request for waiver of the Commission's rules must include a showing: (i) that the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested

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<sup>7</sup> See Letter from Jeremy Greene to Amy Zoslov, Chief, Auction and Industry Analysis Division, dated October 26, 1998 (“October 26, 1998 Letter”); Letter from Jeremy Greene to Amy Zoslov, Chief, Auction and Industry Analysis Division, dated October 29, 1998 (“October 29, 1998 Letter”).

<sup>8</sup> See “Phase II 220 MHz Service Auction Closes: Winning Bidders In the Auction of 908 Phase II 220 MHz Service Licenses,” *Public Notice*, DA 98-2143 (rel. October 23, 1998).

<sup>9</sup> See *First Waiver Denial* at 1.

<sup>10</sup> See Letter from Jeremy Greene to Chairman William Kennard, Commissioners, Susan Ness, Harold Furchtgott-Roth, Michale Powell and Gloria Tristani, dated November 17, 1998 (“petition for reconsideration”).

<sup>11</sup> See *WTB Reconsideration Order*.

<sup>12</sup> *MO&O* at ¶ 8.

<sup>13</sup> See “Phase II 220 MHz Service Spectrum Auction Closes: Winning Bidders in the Auction of 225 Licenses in the Phase II 220 MHz Service,” *Public Notice*, DA 99-1287 (rel. July 1, 1999).

<sup>14</sup> The net bid takes into account the bidding credit that you claimed.

waiver would be in the public interest; or (ii) that in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>15</sup> We do not believe that your request meets the stringent requirements for waiver of the Commission's rules.

Under the Commission's competitive bidding procedures, the bidder submitting the highest bid during the course of the auction is designated the "high" or "winning" bidder. The Commission's bid withdrawal payment rule, Section 1.2104(g), subjects a bidder that withdraws a high bid during the course of the auction to a payment equal to the difference between the amount of its high bid and the winning bid the next time the license is offered at auction by the Commission.<sup>16</sup> The bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the gross withdrawn bid and the gross winning bid, whichever is less. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid.

In your request for waiver, you argue that imposition of the bid withdrawal payment would be unjust, as the payment would be greater than the winning bid for License BEA 160E. You further argue that imposition of the bid withdrawal payment does not promote the policy objectives found in 47 U.S.C. § 309(j)(3)(C). As we demonstrate below, your arguments are meritless.

As mandated by Section 309(j) of the Communications Act, the Commission established a competitive bidding process that ensures that licenses are awarded to those that value them most highly as indicated by submitting the highest bid.<sup>17</sup> The purpose of bid withdrawal payments is to discourage insincere bidding. Insincere bidding, whether frivolous or strategic, distorts the price information generated by the auction process and reduces efficiency. Hence, bid withdrawal payments are essential to the functioning and integrity of the auction process.<sup>18</sup> Absent the required showing, a waiver of the bid

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<sup>15</sup> 47 C.F.R. § 1.925(b)(3).

<sup>16</sup> 47 C.F.R. § 1.2104(g).

<sup>17</sup> 47 U.S.C. § 309(j).

<sup>18</sup> See Implementation of Section 309(j) of the Communications Act-- Competitive Bidding, Second Report and Order, 9 FCC Rcd. 2348, 2404. See also National Telecom PCS, Inc., Request for Waiver of Bid Withdrawal Payment, Order, DA 96-873 (rel. May 30, 1996) ("1996 National Telecom PCS Order") (on delegated authority, the Wireless Telecommunications Bureau denied National Telecom PCS's request for waiver of bid withdrawal payments on the grounds that it submitted an erroneous bid as a result of a clerical error.); National Telecom PCS, Inc., Request for Waiver of Bid Withdrawal Payment and Application for Authority to Construct a Personal Communications System on Frequency Block C in American Samoa, Market No. B492, Memorandum Opinion and Order, 12 FCC Rcd. 10163 (1997) ("1997 National Telecom PCS MO&O"); National Telecom PCS, Inc., Petition for Reconsideration Request for Waiver of Bid Withdrawal Payment and Application for Authority to Construct a Personal Communications System on Frequency Block C in American Samoa, Market No. B492, Order on Reconsideration of Memorandum Opinion and Order, FCC 99-319, (rel. November 2, 1999) 1999 WL 993506 ("1999 National Telecom PCS Order on Recon.").

withdrawal payment rule would threaten the economic efficiency of the auction process and could encourage future bidders to submit "mistaken" bids intentionally in order to gain insight into a competitor's valuation of licenses.<sup>19</sup>

In the *Atlanta Trunking Orders*, the Commission provided guidance for deciding requests for waiver of the bid withdrawal payment rule in cases of unintentional and mistaken bids.<sup>20</sup> The Commission held that waivers or reductions are permissible in instances where there is no evidence of insincere or frivolous bidding or other acts of bad faith related to the actual bid.<sup>21</sup> In those cases bidders had mistakenly entered extra zeros at the end of their bids. Of particular importance in the *Atlanta Trunking Orders* was the round and stage in which a mistaken bid was withdrawn.<sup>22</sup> Using this approach, it is clear that a waiver would be inappropriate in this case. First, you have provided no evidence that your bid was unintentional. Second, your bid was made in round 19, but you did not withdraw your bid until round 41, twenty-two rounds later.

To grant your waiver request would encourage future bidders to hide behind their inexperience to avoid responsibility for their bids. It would also be unfair to other bidders who planned carefully and familiarized themselves with the Commission's rules prior to the start of the auction. Such a result would not be in the public interest.<sup>23</sup> When you made the bid, you assumed the risk that you would be subject to a substantial bid withdrawal payment if you withdrew your bid.

As stated above, your withdrawn bid for License BEA 160E in Auction 18 was \$477,000 (net bid \$310,050.00), and your winning bid in Auction 24 for License BEA

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<sup>19</sup> See *Atlanta Trunking Associates, Inc., and MAP Wireless, L.L.C., Requests to Waive Bid Withdrawal Payment Provisions*, *Order*, 11 FCC Rcd. 17189 (1996); and *Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Petition for Reconsideration of Bid Withdrawal Payment, and Georgia Independent PCS Corporation, Application for Review of Request to Waive Bid Withdrawal Payment, Memorandum, Opinion and Order*, 12 FCC Rcd. 6382, ¶ 10 (1997) (hereinafter referred to as "*1996 Atlanta Trunking Order*" and "*1997 Atlanta Trunking Order*," respectively, or jointly as the "*Atlanta Trunking Orders*").

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

<sup>21</sup> *1996 Atlanta Trunking Order*, FCC Rcd. at 17197-17199, ¶¶ 17-21 and *1997 Atlanta Trunking Order*, FCC Rcd. at 6386, ¶ 7.

<sup>22</sup> *1997 Atlanta Trunking Order* at ¶ 17; See also Letter from Daniel B. Phythyon, FCC, to Tyrone Brown, ClearComm, L.P., DA 98-1074 (rel. June 12, 1998); In the Matter of ClearComm, L.P., *Order*, DA 98-1081, (rel. June 12, 1998) (granting ClearComm's request for reduction of its bid withdrawal payment based upon the totality of the circumstances); Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision, *Order*, DA 96-706, 11 FCC Rcd. 13728 (WTB 1996) (on delegated authority, the Wireless Telecommunications Bureau partially waived the bid withdrawal payment requirement for Georgia Independent PCS Corporation's erroneous bid in Auction No. 5).

<sup>23</sup> See *1996 National Telecom PCS Order* at ¶ 10.

160E was \$199,000 (net bid \$129,350).<sup>24</sup> The difference between the gross withdrawn bid and the gross winning bid is \$278,000, and the difference between the net withdrawn bid and the net winning bid is \$180,700. Thus, pursuant to Section 1.2104(g) of the Commission's rules, your withdrawal payment is \$171,398 (\$180,700 less the \$9,302.00 previously retained from your upfront payment in Auction 18).

Accordingly, IT IS ORDERED that the request for waiver filed on July 16, 1999 by Jeremy A. Greene is DENIED.

IT IS FURTHER ORDERED that the payment of the total amount due and owing of \$171,398.00 is to be made in accordance with the instructions set forth in Attachment A to this letter within thirty days from the release of this letter.

IT IS FURTHER ORDERED that this letter shall be sent to the applicant by certified mail, return receipt requested.

This action is taken under delegated authority pursuant to Section 0.331 of the Commission's Rules.<sup>25</sup>

Sincerely,

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

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<sup>24</sup> The net bid takes into account the bidding credit that you claimed.

<sup>25</sup> 47 C.F.R. § 0.331.