

August 30, 1999  
DA 99-1731

Eric W. DeSilva  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Dear Mr. DeSilva:

In this letter, we set forth the initial default payment obligations and procedures for Progeny LMS, LLC ("Progeny") resulting from its default relating to licenses for which it was the winning bidder in the Location and Monitoring Service ("LMS") auction, Auction No. 21. As discussed below, Progeny is in default on its full payment obligations with respect to two Block B licenses in the following Basic Economic Areas: BEA107, Minneapolis-St. Paul, MN, and BEA164, Sacramento-Yolo, CA. As explained below, Progeny is subject to an initial default payment of \$262.

On March 5, 1999, the Commission concluded Auction No. 21. Progeny was the winning bidder on 230 licenses offered in the auction.<sup>1</sup> On March 8, 1999, the Commission announced by *Public Notice* that by March 22, 1999, winning bidders would be required to have on deposit with Mellon Bank in Pittsburgh, Pennsylvania enough funds to cover down payments for winning bids.<sup>2</sup> Progeny had enough funds on deposit to cover its down payment obligations equal to 20 percent of its winning bids.<sup>3</sup>

Under the Commission's rules, in any one market, LMS licensees may not hold the A block, or sub-band, license in combination with the license for B or C block, but may hold licenses for B block and C block in combination.<sup>4</sup> Progeny, however, was the winning bidder at the close of the auction for both the Block A and Block B licenses in the following two markets: (1) BEA107, Minneapolis-St. Paul, MN; and (2) BEA164, Sacramento-Yolo, CA.<sup>5</sup> Therefore, Progeny is disqualified from holding two of the licenses it won.<sup>6</sup> Subsequently, in letters to the Auctions and Industry Analysis Division, Progeny requested that the Block B licenses for BEA107, Minneapolis-St. Paul, MN, and BEA164, Sacramento-Yolo, CA be removed

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<sup>1</sup> "Location and Monitoring Service Auction Closes," *Public Notice*, DA 99-405 (rel. March 8, 1999) ("*LMS Closing Public Notice*"). Markets for which Progeny submitted winning bids are listed in Attachment A of the *LMS Closing Public Notice*.

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

<sup>3</sup> *See* 47 C.F.R. 1.2107(b). *See also* *LMS Closing Public Notice*, Attachment B.

<sup>4</sup> *See* 47 C.F.R. §§ 90.353(d), (f).

<sup>5</sup> *See* *LMS Closing Public Notice*, Attachment A.

<sup>6</sup> *See* 47 C.F.R. §§ 90.353(d) and (f). *See also* 47 C.F.R. § 1.2109(c).

from Schedule B of its FCC Form 601, thus withdrawing its application for those licenses.<sup>7</sup>

As a result of Progeny's disqualification and withdrawal of its application for the two Block B licenses, Progeny is subject to default payments with respect to its winning bids for these licenses under Section 1.2104(g).<sup>8</sup>

The purpose of the default payment provisions, 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 subsequent auction of the spectrum) even if the winning bidder defaults or is determined to be disqualified and is never granted a license.<sup>9</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 change in the market between the acceptance of the winning bid and the grant of the license.<sup>10</sup> A winning bidder 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.<sup>11</sup>

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<sup>7</sup> See Letter to Margaret Wiener, Chief, Legal Branch, Auction and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Curtis Johnson, President, Progeny Post LMS, Inc., re: Minor Amendment to the FCC Form 601 Application of Progeny LMS, LLC for Authorizations in the Location and Monitoring Service, Auction No. 21, File No. 6894 (May 29, 1999). See also Letter to Margaret Wiener, Chief, Legal Branch, Auction and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Eric W. DeSilva, Wiley, Rein & Fielding, re: Minor Amendment to the FCC Form 601 Application of Progeny LMS, LLC for Authorizations in the Location and Monitoring Service, Auction No. 21, File No. 6894 (June 3, 1999). Progeny's FCC Form 601 will continue to list Block A in BEA107, Minneapolis-St. Paul, MN, and BEA164, Sacramento-Yolo, CA.

<sup>8</sup> See 47 C.F.R. § 1.2104(g); Tel-Com Wireless Cable TV Corporation, *Order*, 12 FCC Rcd 6747 (1997); Wireless Telecommunications, Inc., *Order*, 12 FCC Rcd 6751 (1997) (Video Services Division, Mass Media Bureau, permitted selective default on second down payments, subject to penalties for default). See also Letter to John A. Prendergast, Esq., Counsel for New Wave Networks, L.L.C., Blooston Mordkofsky Jackson & Dickens, from Amy J. Zoslov, Chief, Auction and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 14 FCC Rcd 6323 (April 9, 1999) ("*New Wave Payment Order*") (setting forth default payment obligations and procedures).

<sup>9</sup> 47 C.F.R. § 1.2104(g)(2).

<sup>10</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications (PCS) Licensees, Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Second Order on Reconsideration of the Second Report and Order*, FCC 99-66, n.66 (rel. April 5, 1999).

<sup>11</sup> See In the Matter of Baker Creek Communications, L.P. for Authority to Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas, File No. 0000000111, *Order*, DA 99-1037 (rel. July 15, 1999).

———Under the Commission's Rules, if a winning bidder fails to timely remit the required down payment, it will be deemed to have defaulted on its auction payment obligations.<sup>12</sup> Defaulters are subject to a default payment comprised of two components that are added together to calculate the full default payment.<sup>13</sup> The first component of the default payment is the difference between the gross defaulted bid and the gross subsequent winning bid, or the difference between the net defaulted bid and the net subsequent winning bid, whichever is less.<sup>14</sup> In the event that the difference between either the gross bids or the net bids, as calculated above, is less than or equal to zero, the first component of the payment will be set to zero. The second component of the payment is computed by taking three percent of the subsequent winning bid or the defaulted bid, whichever is less. Where a bidding credit applies to the winning bid from either the original or the subsequent auction, the calculation of the three percent payment is based on the smaller of the two gross bids or smaller of the two net bids, whichever basis (gross or net) was used to figure the first component. Thus, if the difference between the gross bids is less than the difference between the net bids, the three percent payment will be computed on the lower of the gross bids. If the difference between the net bids is less than or equal to the difference between the gross bids, the three percent payment will be computed on the lower of the net bids. However, if the differences between both the gross bids and the net bids are less than or equal to zero, three percent payment will be computed on the lower of the net bids.

Because the Block B licenses for BEA107, Minneapolis-St. Paul, MN, and BEA164, Sacramento-Yolo, CA will be included in a later LMS auction, which is not yet scheduled, we cannot, at this time, determine the full amount of the default payment owed by Progeny. Therefore, pursuant to Commission practice, we will assess a holding deposit toward the default payment owed by Progeny<sup>15</sup> amounting to three percent of Progeny's net bids on the two licenses.<sup>16</sup> Specifically, Progeny will be assessed \$262,<sup>17</sup> which is three percent of its total net bids for the Block B licenses for BEA107, Minneapolis-St. Paul, MN, and BEA164, Sacramento-Yolo, CA. Progeny's credited amounts for the initial down payments for these two Block B licenses, when combined with the assessed default payment, is sufficient to satisfy Progeny's initial default payment obligations. Therefore, we will remit to Progeny its excess on deposit.<sup>18</sup> In order to process

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<sup>12</sup> 47 C.F.R. § 1.2109(b).

<sup>13</sup> 47 C.F.R. § 1.2104(g).

<sup>14</sup> The gross bid is the dollar amount bid, exclusive of any bidding credits. The net bid is the dollar amount bid taking account of any bidding credit for which the high bidder is eligible under Commission Rules.

<sup>15</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, 2382-83, ¶¶ 195-197 (1994). See also "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly," *Public Notice*, 11 FCC Rcd 10853 (1996).

<sup>16</sup> See 47 C.F.R. § 1.2104(g). See also Default Settlement Calculation, attached hereto as Attachment A.

<sup>17</sup> See Default Settlement Calculation, attached hereto as Attachment A.

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

your refund request, the Commission must receive wire transfer instructions.<sup>19</sup> If an additional payment is required following the next LMDS auction, a second Order will assess the amount due.

Accordingly, Progeny is assessed an initial default payment on the Block B licenses for BEA107, Minneapolis-St. Paul, MN, and BEA164, Sacramento-Yolo, CA in the amount of \$262 and its application with respect to these two licenses is dismissed. In addition, Progeny will be subject to the balance of the payment specified in Section 1.2104(g) once the Block B licenses for BEA107, Minneapolis-St. Paul, MN, and BEA164, Sacramento-Yolo, CA are auctioned and the actual default payment for each license is determined.<sup>20</sup> Further, Progeny is required to amend its FCC Form 601 to reflect the dismissal of its application with respect to these two licenses. 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>19</sup> See Transfer Instructions, attached hereto as Attachment B.

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

# Progeny LMS, LLC

## Default Settlement Calculation

### Defaulted Licenses High Bids

<u>License</u>	<u>Gross</u>	<u>Net</u>	<u>Default Withholding</u>
BEA107B	\$9,000.00	\$5,850.00	3% \$176.00
BEA164B	\$4,400.00	\$2,860.00	3% \$86.00
Total	\$13,400.00	\$8,710.00	\$262.00

### Total High Bids

**Gross:**

Total Licenses Won: (230)	
Total Winning Bids	\$3,636,562.00
Less Bids of Defaulted Lic.	( <u>\$13,400.00</u> )
New Total Winning Bids	\$3,623,162.00

**Net:**

Total Winning Bids	\$2,363,766.00
Less Bids of Defaulted Lic.	( <u>\$8,710.00</u> )
New Total Winning Bids	\$2,355,056.00

### Final Settlement Calc.

Upfront Payments	\$1,879,155.00	(Received 2/8/99)
Total Withdrawal Payments	( <u>\$104.00</u> )	
Default Withholding	( <u>\$262.00</u> )	
Initial Down Payment	( <u>\$471,011.20</u> )	(20% of New Total Net Winning Bids)
Initial Amount Refunded	( <u>\$1,406,297.80</u> )	(Remitted 4/1/99)
Remaining Amount to be Refunded	\$1,480.00	

## **ATTACHMENT B Transfer Instructions**

In order to process refund requests, the FCC must receive wire transfer instructions that include the following information:

Name and Address of Bank  
ABA Number  
Contact and Phone Number  
Account Number to Credit  
Name of Account Holder  
Correspondent Bank (if applicable)  
ABA Number  
Account Number

Please include your Taxpayer Identification Number ("TIN"), and a copy of this Order (DA 99-1726). This information should be sent to the Auctions Accounting Group:

Federal Communications Commission  
Auctions Accounting Group  
Attn: Michelle Bennett or Gail Glasser  
445 12<sup>th</sup> Street, SW, Room 1-A843  
Washington, DC 20554

Bidders can also fax their request to the Auctions Accounting Group at (202) 418-2843. Once the request has been processed, a refund will be sent to the address provided on the FCC Form 159.