

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Entertainment Unlimited, Inc.)
Request for Refund of Late Payment)
Fees for PCS Licenses Purchased in)
Auction No. 22)

ORDER ON RECONSIDERATION

Adopted: July 3, 2000

Released: July 3, 2000

By the Chief, Wireless Telecommunications Bureau

I. Introduction

1. In this *Order on Reconsideration*, we deny the Petition of Entertainment Unlimited, Inc. (“EU”)¹ for Reconsideration of the *Order* issued by the Auctions and Industry Analysis Division (the “Division”) in the above-captioned proceeding.² The *Order* denied EU’s request for refund of \$104,550 in late payment fees assessed in connection with EU’s purchase of two broadband PCS licenses in Auction No. 22.³ In its Petition, EU seeks reversal of the *Order* and a refund of the late payment fees and associated interest. For the reasons discussed below, we affirm the *Order* and deny EU’s Petition for Reconsideration.

II. Background

2. The Commission concluded Auction No. 22 on April 15, 1999. EU was the winning bidder on C block licenses in the Visalia-Porterville-Hanford, CA and Bakersfield, CA Basic Trading Areas (“BTAs”).⁴ The total amount owed for these two licenses was \$2,613,750, and the deadline for making final payments was June 25, 1999.⁵ EU missed the final payment

¹ See Petition of Entertainment Unlimited, Inc. for Reconsideration of Order Denying Its Request for Refund of Late Fee, filed by Stephen Kaffee, counsel for Entertainment Unlimited, Inc., on December 22, 1999 (“Petition”).

² See In the Matter of Entertainment Unlimited, Inc., Request for Refund of Late Payment Fees for PCS Licenses Purchased in Auction No. 22, *Order*, 14 FCC Rcd 19551 (1999) (“*Order*”).

³ *Id.*

⁴ “C, D, E, and F Block Broadband PCS License Auction Closes,” *Public Notice*, 14 FCC Rcd 6688 (1999).

⁵ “Wireless Telecommunications Bureau Announces It Is Prepared to Grant 161 C, E, & F Block Broadband PCS Licenses,” *Public Notice*, DA 99-1156 (rel. June 11, 1999).

deadline and, instead, made full payment on the licenses, along with a five percent late fee of \$104,550, on July 9, 1999, as permitted by Section 1.2109(a) of our rules.⁶

3. EU subsequently filed a request for refund of the \$104,550 late fee (“Refund Request”).⁷ In its request, EU argued that the Commission was responsible for EU’s failure to meet the final payment deadline.⁸ After the close of Auction No. 22, the Commission deducted the down payments due for the Visalia-Porterville-Hanford and Bakersfield licenses, leaving an excess upfront payment amount of \$1,777,250 on deposit with the Commission.⁹ Having received no instructions on how to refund this amount for over a month after the conclusion of Auction No. 22, Commission staff contacted Raveesh K. Kumra, the “Payer” listed on FCC Form 159. Mr. Kumra, in turn, directed the Commission to refund back to his account the excess payments from Auction No. 22. Accordingly, on May 28, 1999, the Commission wire transferred to Mr. Kumra the excess upfront payment amount of \$1,777,250.

4. In its Refund Request, EU argued that the Commission mishandled the \$1,777,250 excess upfront payment, leaving EU without the means to make timely payment on the licenses.¹⁰ EU noted that the Commission’s procedures require it to refund excess upfront payments to the “payor of record.”¹¹ EU argued that the “payor of record” is the individual designated as the “Contact Person” on the FCC Form 175.¹² EU had identified Dave Pruett as its “Contact Person” and maintained that only Mr. Pruett was authorized to provide instructions to the Commission with respect to the refund of the excess upfront payment.¹³ EU argued that by soliciting and accepting refund instructions from Mr. Kumra, the “Payer” identified on FCC Form 159, rather than Mr. Pruett, the “Contact Person” designated on FCC Form 175, the Commission violated its own procedures.¹⁴ According to EU, although the \$1,777,250 had been refunded to Mr. Kumra’s account, Mr. Pruett believed that the excess upfront payment was in the Commission’s possession.¹⁵ EU claimed that Mr. Pruett intended to authorize the Commission to apply that amount to the balance EU owed for the two C block licenses and then pay the remaining balance of \$313,750 by wire transfer to the Commission by the final payment

⁶ 47 C.F.R. § 1.2109(a).

⁷ Request for Refund of Late Payment Fee for PCS Licenses Purchased at Auction No. 22, filed by Stephen Kaffee, counsel for Entertainment Unlimited, Inc., on August 6, 1999 (“Refund Request”).

⁸ *Id.*

⁹ “C, D, E, and F Block Broadband PCS License Auction Closes,” *Public Notice*, 14 FCC Rcd 6688.

¹⁰ *See generally* Refund Request.

¹¹ Refund Request at 2. EU attempts to distinguish the terms “Payer,” listed on FCC Form 159 from “payor of record,” identified in “C, D, E, and F Block Broadband PCS License Auction Closes,” *Public Notice*, 14 FCC Rcd at 6692. We reject this argument as discussed below.

¹² Refund Request at 2-4.

¹³ *Id.* at 2.

¹⁴ *Id.* at 2-3.

¹⁵ *Id.* at 4.

deadline.¹⁶ EU asserted that because the Commission refunded the \$1,777,250 to Mr. Kumra, EU did not have the funds available to make final payment on the licenses by the due date.¹⁷

5. The Division's *Order* denied EU's Refund Request.¹⁸ The *Order* affirmed that the Commission's policy is to make refunds of excess upfront payments to the "payor of record."¹⁹ The *Order* made clear, however, that the "payor of record" is not the "Contact Person" designated on an applicant's FCC Form 175, as EU argued, but is the individual or entity identified on the FCC Form 159 as the "Payer," in this case, Mr. Kumra.²⁰ The *Order* noted that the "Contact Person" is simply the individual to whom registration information and questions concerning an applicant's Form 175 are directed.²¹ Moreover, the *Order* determined that the Commission was entirely within its authority in contacting Mr. Kumra, the "payor of record," for the purpose of receiving instructions regarding the refund of the excess upfront payment.²² The *Order* thus concluded that the Commission acted consistent with its procedures in refunding the \$1,777,250 excess upfront payment.²³

III. Discussion

6. In its Petition for Reconsideration, EU seeks a reversal of the Division *Order*, which denied EU's request for refund of late payment fees. EU contends, as it did in its Refund Request, that it is entitled to a refund of the \$104,550 in late fees because the Commission mishandled the excess upfront payment and, thereby, deprived EU of the money it needed to make timely payment on its two C block licenses.²⁴

7. EU's allegations of Commission error are based on its misinterpretation of key language contained in a *Public Notice* pertaining to Auction No. 22. That *Public Notice*, released on April 20, 1999, made the following statement concerning refunds of excess upfront payments to winning bidders:

Upfront monies on deposit which are in excess of the required down payment, withdrawal and/or default payment amounts will be refunded to the *payor of record promptly upon receipt of the necessary wire transfer instructions.*²⁵

¹⁶ *Id.*

¹⁷ *Id.* at 4-5.

¹⁸ *See generally Order*, 14 FCC Rcd 19551.

¹⁹ *Id.* at 19554, ¶ 7.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 19554, ¶ 8.

²³ *Id.* at 19554, ¶ 7.

²⁴ *See generally* Petition.

²⁵ "C, D, E, and F Block Broadband PCS License Auction Closes," *Public Notice*, 14 FCC Rcd at 6692 (emphasis added).

EU argues, as it did in its Refund Request, that the Commission failed to comply with these procedures for refunding excess upfront payments. EU interprets the language “upon receipt of the necessary wire transfer instructions” to mean that the Commission may not affirmatively contact the “payor of record” to obtain instructions concerning the refund of monies but, rather, must wait until the “payor of record” first contacts the Commission with such instructions.²⁶ EU argues that by initiating contact with Mr. Kumra, the Commission acted outside the scope of the *Public Notice*.²⁷ In its Petition, EU states that “[c]ontrary to the procedures set forth in the *Public Notice*, the Commission acted pro-actively to dispose of EU’s excess upfront payment.”²⁸ The language in the *Public Notice* does not support EU’s contention that the Commission is prohibited from seeking wire transfer instructions. The cited language does not address whether the Commission or the bidder is required to initiate communications regarding wire transfer instructions. The phrase “upon receipt of the necessary wire transfer instructions” simply means that the Commission will not refund monies without first receiving instructions. This language does not dictate who must contact whom first regarding the communication of wire transfer instructions. The Commission may, consistent with the referenced language, take affirmative action to contact the “payor of record” with questions about the disposition of excess monies on deposit as it deems appropriate. The Commission’s policy is that upon receiving instructions concerning the disposition of excess funds on deposit, either by first contacting the “payor of record” or by being contacted by the “payor of record,” it will take action in accordance with those instructions.

8. EU also contends that by refunding the excess upfront payment to Mr. Kumra, rather than to EU, the Commission violated procedures set forth in the *Public Notice* that require it to refund excess upfront payments to the “payor of record.”²⁹ EU argues that the bidder, not the “Payer” listed on FCC Form 159 is the “payor of record.”³⁰ The Division fully addressed this argument in the *Order*. The Division explained that the “payor of record” is the individual or entity designated on FCC Form 159 as the “Payer,” not the individual identified on FCC Form 175 as the “Contact Person.”³¹ The Division further stated that in each of the 25 auctions conducted thus far, the Commission has relied on instructions from the “Payer” regarding refunds of excess upfront payment amounts.³² If the Commission had intended to rely on the “bidder” or “Contact Person” in matters related to the refund of excess upfront payments, it would have specifically stated in the *Public Notice* that excess payments will be refunded to the “bidder” or “Contact Person.” Instead, the Commission used the term “payor of record.”

²⁶ Petition at i, 3,5

²⁷ *Id.* at 5.

²⁸ *Id.* at i.

²⁹ *Id.* at 5-7

³⁰ *Id.* at 6. In its Refund Request EU argued that the “payor of record” was the “Contact Person” identified on FCC Form 175, while in its Petition, EU argues that the “payor of record” is the bidder. With respect to either contention, our analysis concerning the definition of “payor of record” remains the same.

³¹ *Order*, 14 FCC Rcd at 19554, ¶ 7.

³² *Id.*

9. On reconsideration, EU notes that the term used on FCC Form 159 is “Payer,” not “Payor,” as in the phrase “payor of record” in the *Public Notice*.³³ EU argues that “[t]his discrepancy in spelling is not an inconsequential matter” and insists that the difference in spelling supports its position that the “payor of record” is the bidder and not the “Payer” on FCC Form 159.³⁴ EU’s arguments are unfounded. EU is attempting to extract meaning from the fact that there is a simple variation in spelling, but EU does not cite any Commission precedent demonstrating that the Commission regards “Payer” differently from “payor.” Furthermore, both Webster’s Dictionary and Black’s Law Dictionary indicate that the terms “payer” and “payor” are synonymous.³⁵ Both terms refer to the individual or entity that pays.³⁶ When payments are made to the Commission, the individual or entity that submits payment is identified on FCC Form 159 as the “Payer.” In the auctions context, where the name of the “Payer” is different from the name of the applicant, the Commission does not assume anything about the significance of this difference. Since the Commission has no knowledge of the private arrangements that may exist between such “Payers” and “bidders,” in returning excess funds on deposit, the Commission follows the instructions of the individual or entity that made the payment.³⁷ We affirm the determination in the *Order* that the “payor of record” is the “Payer” listed on FCC Form 159. Accordingly, we conclude that the Commission acted consistent with the *Public Notice* in refunding the excess upfront payment to Mr. Kumra, the “Payer” designated on FCC Form 159.

10. EU offers no evidence of prior Commission statements or practices to support its reading of the relevant language in the *Public Notice*. EU accuses the Commission of violating its own procedures in handling the excess upfront payment when, in fact, the Commission followed the same policies it has consistently adhered to in the past in similar circumstances. In this instance, as in other cases involving refunds of excess upfront payments, the Commission returned the excess payment to the “payor of record” pursuant to the payor’s instructions. The Commission’s practice has been to contact the “Payer” on FCC Form 159 in instances in which a significant period of time has elapsed after the close of an auction and the Commission has not received instructions on how to handle the deposits. Ordinarily, however, interested parties contact the Commission shortly after an auction closes to request refund of their deposits or to direct that such deposits be applied to the balances owed the Commission. While the Commission does initiate contact, when necessary, most parties closely monitor their deposits at the Commission and are quick to make inquiries or provide instructions to the Commission

³³ Petition at 6.

³⁴ *Id.*

³⁵ See definitions of “payer” and “payor” in Webster’s Third New International Dictionary (unabridged, 1993) and Black’s Law Dictionary (6th ed. 1990).

³⁶ *Id.*

³⁷ EU contends that the use of the term “bidders” in Section 309(j)(8)(C) of the Communications Act implies that all upfront deposits made with the Commission belong to bidders, not other “Payers.” Petition at 6-7; 47 U.S.C. § 309(j)(8)(C). We reject this interpretation of the statute. The FCC Form 159, itself, recognizes that the “Payer,” *i.e.*, the individual or entity that makes payment, may be distinct from the bidder. FCC Form 159 specifically instructs that “[i]f payer name and the applicant name are different, complete section B.” The Commission permits entities other than the bidder to make upfront payments for licenses because it seeks to provide bidders with flexibility in how they raise capital and structure their businesses. Where the upfront payment exceeds the required post-auction payments, the Commission, rather than assuming that the bidder is entitled to a refund, follows the “Payer’s” instructions, leaving it to the parties to determine the disposition of the excess payment pursuant to private arrangements.

concerning excess deposits. EU, however, was silent with respect to the excess upfront payment. As the Division noted in the *Order*, for more than a month after Auction No. 22 closed, neither the “Contact Person” nor any EU representative contacted the Commission with directions concerning the excess upfront payment retained by the Commission.³⁸ In fact, in its Petition for Reconsideration, EU states that “[i]n an effort to avoid any confusion regarding the application of its excess deposit,” it decided not to provide instructions to the Commission until payment for its licenses was due.³⁹ EU claims that it was “concerned that the risk that the Commission would not follow its instructions regarding the application of its excess deposit would be increased if it provided directions too early in the payment process.”⁴⁰ These assumptions are groundless. There is simply no basis in fact for EU’s claims, nor does EU provide any rationale to support its suppositions. To the contrary, the Commission is most eager to ensure that excess deposits are transferred to the proper accounts promptly after an auction closes. Further, the Commission is highly reliable in following instructions regarding the disposition of excess upfront payments, and EU presents no evidence to the contrary.

11. It is the bidder’s obligation to make certain that the Commission is informed of the intent to apply the excess upfront payment to the balance owed on the licenses by ensuring that the “Payer” designated on FCC Form 159 provides the appropriate instructions to the Commission. Had Mr. Kumra directed the Commission to apply the excess upfront payment to the balances owed for the licenses, the Commission would have taken such action. The delay in payment for which EU was assessed \$104,550 in late fees was not caused by Commission error or a violation of Commission policy but was the consequence of EU’s own internal coordination problems. EU and Mr. Kumra apparently had different ideas regarding the disposition of the excess upfront payment. It was incumbent upon EU to inform itself of the Commission’s policies concerning such payments. Having failed to do so, EU now blames the Commission for what it claims was the “mishandling” of the excess payment. The Commission is not at fault when an entity misses a payment deadline because it has failed to either coordinate internally or communicate in an appropriate manner its objectives to the Commission.

12. EU disputes the Division’s interpretation of Section 309(j)(8)(C) of the Communications Act.⁴¹ Pursuant to Section 309(j)(8)(C), the Commission has 45 days following the conclusion of an auction to either transfer the deposits of successful bidders to the Treasury or return the deposits of unsuccessful bidders to such bidders.⁴² In the *Order*, the Division interpreted that Section to mean that the Commission may retain non-defaulting bidders’ deposits for only 45 days after an auction closes.⁴³ The *Order* explains that, based on this interpretation, the Commission contacted Mr. Kumra concerning the excess upfront payment when no EU representative had contacted the Commission for over a month after Auction No. 22 closed. EU

³⁸ See *Order*, 14 FCC Rcd at 19554, ¶ 8.

³⁹ Petition at 3.

⁴⁰ *Id.* at 3, n.2.

⁴¹ *Id.* at 3-4; 47 U.S.C. § 309(j)(8)(C).

⁴² 47 U.S.C. § 309(j)(8)(C).

⁴³ We note that with respect to defaulting bidders, the Commission calculates an initial default payment amount which is neither returned to the bidder nor deposited with the Treasury but retained in a separate account.

contends that Section 309(j)(8)(C) does not impose an obligation to repay the excess upfront payments of successful bidders within 45 days. The Division sought to process the excess upfront payment in a time frame consistent with the intent expressed by Congress in Section 309(j)(8)(C). Seeking instructions from the “payor of record” was a reasonable means of accomplishing that objective.

13. For the reasons discussed above, we deny EU’s Petition for Reconsideration of the *Order* issued by the Division in the above-captioned proceeding. This action is taken under delegated authority pursuant to Section 0.331 of the Commission’s rules.⁴⁴

Federal Communications Commission

Thomas J. Sugrue
Chief, Wireless Telecommunications Bureau

⁴⁴ 47 C.F.R. § 0.331.