

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

Adopted: November 19, 1999

Released: November 19, 1999

By the Chief, Auctions and Industry Analysis Division:

I. Introduction

1. This *Order* denies a request for refund of late payment fees filed by Entertainment Unlimited, Inc. ("EU") in connection with two broadband PCS licenses purchased in Auction No. 22.¹ EU requests that the Commission refund late fees assessed against EU for failure to pay by the final payment deadline the balance of its winning bids on C block licenses in the Visalia-Porterville-Hanford, CA and Bakersfield, CA Basic Trading Areas ("BTAs"). For the reasons discussed below, we deny EU's request.

II. Background

2. Prior to the commencement of Auction No. 22, the Commission received an upfront payment for EU of \$2,300,000. This payment was accompanied by an FCC Remittance Advice Form (FCC Form 159) designating Raveesh K. Kumra as the "Payor" and Entertainment Unlimited, Inc. as the "Applicant." On April 15, 1999, the Commission concluded Auction No. 22. EU was the winning bidder on C block licenses in the Visalia-Porterville-Hanford, CA and Bakersfield, CA BTAs.² The down payment owed by EU for these licenses was \$522,750, which the Commission deducted from EU's upfront payment of \$2,300,000, leaving an excess upfront payment amount of \$1,777,250.³ The Commission retained this amount while it waited to receive instructions on how to refund the \$1,777,250.⁴ Having received no instructions for over a month after the conclusion of Auction No. 22, Commission staff contacted Mr. Kumra, the "Payor" listed on FCC Form 159. On May 27, 1999, Mr. Kumra directed the Commission to refund back to his account the excess payments from Auction No. 22. Accordingly, on

¹ See Request for Refund of Late Payment Fee for PCS Licenses Purchased at Auction No. 22, filed by Stephen Kaffee, Esq., on behalf of Entertainment Unlimited, Inc., August 6, 1999 ("EU Refund Request").

² "C, D, E, and F Block Broadband PCS License Auction Closes," *Public Notice*, 14 FCC Rcd 6688 (1999).

³ *Id.*

⁴ See *id.* at 6692.

May 28, 1999, the Commission wire transferred to Mr. Kumra the excess upfront payment amount of \$1,777,250.

3. On June 11, 1999, the Wireless Telecommunications Bureau (the "Bureau") announced by *Public Notice* that it was prepared to grant EU's application for the Visalia-Porterville-Hanford and Bakersfield C block licenses provided that EU made final payment before the deadline established by the Commission.⁵ The final payment deadline was June 25, 1999.⁶ The *Public Notice* also provided that if EU failed to pay the balance of its winning bid in a lump sum by the final payment deadline, it would be permitted to make a late payment by July 12, 1999, provided that it also paid a late fee equal to five percent of the amount due.⁷ EU made final payment on its two C block licenses on July 9, 1999. This payment included a late fee of five percent of the amount due on the licenses. Specifically, EU paid \$1,500,760 for its Bakersfield license, \$590,240 for its Visalia-Porterville-Hanford license and a \$104,550 late fee, for a total payment to the Commission of \$2,195,550. On October 7, 1999, the Bureau granted EU the two C block licenses for which it was the winning bidder in Auction No. 22.⁸

III. Discussion

4. EU requests that the Commission refund the \$104,550 late fee assessed against EU for failure to pay by the final payment deadline the balance of its winning bids on the Visalia-Porterville-Hanford and Bakersfield C block licenses.⁹ EU argues that it is entitled to a refund of the late fee because the Commission failed to follow its own procedures in refunding the excess upfront payment amount, leaving EU with insufficient funds to make payment on the C block licenses by the due date.¹⁰ Specifically, EU contends that by refunding to Mr. Kumra, rather than to EU, the excess upfront payment of \$1,777,250, the Commission effectively deprived EU of the means to make a timely final payment.¹¹

5. On its short-form application (FCC Form 175) for Auction No. 22, EU listed Dave Pruett as the "Contact Person." According to EU, Mr. Pruett believed that he was the individual authorized to make decisions concerning the excess upfront payment.¹² Consequently, EU claims that although the

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).

⁶ *Id.*

⁷ *Id.*; see 47 C.F.R. § 1.2109(a).

⁸ "Wireless Telecommunications Bureau Grants Entertainment Unlimited Two C Block Broadband PCS Licenses," *Public Notice*, DA 99-2107 (rel. October 7, 1999).

⁹ EU Refund Request at 1.

¹⁰ *Id.* at 3-4.

¹¹ *Id.* at 4.

¹² *Id.* at 2, 4.

Commission refunded the excess upfront payment to Mr. Kumra, Mr. Pruett believed that this money was still in the Commission's possession.¹³ EU explains that Mr. Kumra made the upfront payment from his account to the Commission on behalf of EU as part of his contribution to the corporation's capitalization.¹⁴ EU insists that although the money was paid from Mr. Kumra's account, the funds had already been committed to EU and belonged to the corporation.¹⁵ According to EU, Mr. Pruett had intended to authorize the Commission to apply the excess upfront payment to the balance that EU owed for the two C block licenses and then pay the remaining balance of \$313,750 by wire transfer to the Commission.¹⁶ EU contends, however, that because the Commission refunded the \$1,777,250 to Mr. Kumra, it did not have the funds available to make final payment on the licenses by the due date.¹⁷

6. EU argues that the Commission erred in soliciting and accepting refund instructions from Mr. Kumra when Mr. Pruett was identified as EU's "Contact Person."¹⁸ EU insists that only its designated "Contact Person" was authorized to provide instructions to the Commission with respect to the refund of the excess upfront payment.¹⁹ EU maintains that by returning the excess upfront payment of \$1,777,250 to Mr. Kumra's personal account, the Commission violated its own procedures, which require it to refund excess upfront payment amounts to the "payor of record" who, EU argues, is Mr. Pruett, not Mr. Kumra.²⁰

7. In our *Public Notice*, released on April 20, 1999, we made the following statement with regard to 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.²¹

EU is correct in stating that the Commission is required to make refunds of upfront payments to the "payor of record." EU, however, is incorrect in asserting that Mr. Pruett is the "payor of record." The "payor of

¹³ *Id.* at 4.

¹⁴ *Id.* at n.4.

¹⁵ *Id.*

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 4-5.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ *Id.* at 3.

²¹ "C, D, E, and F Block Broadband PCS License Auction Closes," *Public Notice*, 14 FCC Red at 6692 (emphasis added).

record" is the individual or entity designated on the FCC Form 159 as the "Payor." In each of the 25 auctions conducted thus far, the Commission has relied on instructions from the "Payor" regarding refunds of excess upfront payment amounts. The FCC Form 159 must be submitted to the Commission with virtually all auctions-related payments. Clearly, in stating that we will refund excess upfront payments to the "payor of record," we are referring to the "Payor" identified on Form 159. In this case, EU's Form 159 specifically designated Raveesh K. Kumra as the "Payor." Thus, Mr. Kumra is the "payor of record," and the Commission, in accordance with its own policies and procedures, properly relied on Mr. Kumra's instructions in refunding to him the excess upfront payment amount of \$1,777,250. Contrary to EU's assertions, the "payor of record" is not the individual listed on an applicant's short-form application as the "Contact Person." The "Contact Person" on an applicant's FCC Form 175 is the individual to whom registration information and Commission questions about an applicant's Form 175 are directed. If we had intended to rely on the "Contact Person" in matters related to the refund of excess upfront payments, we would have specifically referenced the "Contact Person" as opposed to the "payor of record."

8. Further, the Commission was entirely within its authority in contacting Mr. Kumra for the purpose of receiving instructions regarding the refund of the excess upfront payment. Pursuant to Section 309(j)(8)(C) of the Communications Act, 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.²² Ordinarily, bidders contact the Commission shortly after an auction closes to request a refund of their deposits or to direct that such deposits be applied to the balances owed the Commission. In some instances, however, when 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, it contacts the "payor of record." The Commission takes this affirmative step because under the statute it may retain bidders' deposits for only 45 days after an auction closes. In this instance, Auction No. 22 closed on April 15, 1999. For more than a month after the auction closed, neither the "Contact Person" nor any other EU representative contacted the Commission with directions concerning the excess upfront payment retained by the Commission. Finally, on May 27, 1999, the Commission contacted the "payor of record," Mr. Kumra, to receive instructions concerning this payment. Such action on the part of the Commission was necessitated by its statutory obligations and is wholly consistent with its stated procedures.

9. Finally, EU's claims that it believed the excess upfront payment amount of \$1,777,250 was in the Commission's possession and that it intended to pay by the final payment deadline the full amount owed on its two C block licenses are not supported by the facts. EU owed a final payment amount of \$2,091,000 on the licenses. If EU believed that the Commission had retained the \$1,777,250 amount, EU simply could have wire transferred \$313,750 to the Commission in an effort to make full and timely payment on the licenses. While EU states that it intended to wire the Commission this amount, it never did. EU did not make final payment on its licenses until July 9, 1999, two weeks after the final payment due date. EU does not explain why it did not, at a minimum, pay the \$313,750 amount in light of its belief that the Commission had retained the excess upfront payment and EU's intention to pay the remaining balance owed on the licenses by the final payment deadline. Instead, EU blames the Commission for its failure to make timely payment on the licenses. The Commission is not at fault when an entity misses a payment deadline due to internal coordination problems among personnel connected with the entity.

²² 47 U.S.C. § 309(j)(8)(C).

10. For the reasons discussed above, we deny EU's request for a refund of the \$104,550 late fee assessed against it for failure to make timely payment on its C block licenses purchased in Auction No. 22. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's Rules.²³

FEDERAL COMMUNICATIONS COMMISSION

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

²³ 47 C.F.R. § 0.331.