

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

In the Matter of)	
)	
Application of)	
)	FCC Account No. 0261307159
PASS WORD, INC.)	
)	
To Participate in the 929/931 MHz)	
Paging Auction (Auction No. 26))	
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 2000

Released: March 21, 2000

By the Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

1. The Auctions and Industry Analysis Division (“Division”) has before it an Emergency Petition for Reconsideration¹ filed by Cook Telecom, Inc. (“Cook”) seeking rescission of a rule waiver granted to Pass Word, Inc. (“Pass Word”) on February 15, 2000.² On February 8, 2000, Pass Word filed a request to amend its short-form application (FCC Form 175) for participation in Auction No. 26, the 929 and 931 MHz Paging Auction.³ Specifically, Pass Word sought permission to add 931 MHz license frequency blocks AA and AC through BK within the four market service areas specified in its FCC Form 175 (MEA041, Spokane-Billings; MEA042, Salt Lake City; MEA045, Portland; and MEA046, Seattle).⁴ The Division granted this waiver of Section 1.2105 (b)(2) of the Commission’s Rules⁵ to permit Pass Word to change the license service areas identified on its FCC Form 175 for good cause shown. For the reasons set forth below, Cook’s Petition is denied.

¹ Cook Telecom, Inc. Emergency Petition for Reconsideration, filed February 18, 2000 (“Petition”).

² See Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, DA 00-274, released February 15, 2000 (“Waiver Letter”).

³ See Letter from Melodie A. Virtue, Haley, Bader & Potts, P.L.C., to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, February 8, 2000 (“Request”); See also 47 C.F.R. § 1.2105(b)(2).

⁴ *Id.*

⁵ 47 C.F.R. § 1.2105(b)(2).

2. Cook's Petition first argues that Pass Word's Request should have been dismissed solely because it is procedurally defective.⁶ In support of this argument, Cook states that Section 1.927(i) of the Commission's Rules requires that when a public notice has been issued listing applicants as mutually exclusive, an amendment to one mutually exclusive application must be served on other mutually exclusive applicants. Cook argues that it and other applicants for the same Major Economic Areas (MEAs) as Pass Word ". . . were foreclosed, to their prejudice, from challenging the propriety of the amendment prior to the Bureau's action,"⁷ because they were not served with Pass Word's Request. Cook's reliance on Section 1.927 of the Commission's Rules is misplaced. This rule does not apply to amendments to pending applications in auctionable services, which is the case here. Section 1.927(a) states that, "Pending applications may be amended as a matter of right if they have not been designated for hearing or listed in a public notice as accepted for filing for competitive bidding, except as provided in paragraphs (b) through (e) of this section." Paragraph (b) reads that "Applicants for an initial license in auctionable services may amend such applications only in accordance with Subpart Q of this part." The applicable rule in Subpart Q, Competitive Bidding Proceedings, of the Part 1 rules is Section 1.2105(b), which does not require that notice be served on other applicants.

3. Additionally, Cook claims that filing the application amendment and waiver request without serving a copy to other mutually exclusive applicants constituted a prohibited *ex parte* presentation to the Wireless Telecommunications Bureau ("Bureau"), which should have resulted in dismissal of the amendment, including the waiver request.⁸ Generally, however, mutually exclusive short form applications (FCC Form 175) are treated as exempt proceedings, and therefore, not subject to the *ex parte* prohibitions that generally pertain to restricted proceedings.⁹

4. Cook further asserts that the Bureau was "unjustifiably generous in accepting Pass Word's claim that it was confused by auction materials."¹⁰ Requests for waiver of rules must meet the criteria for granting a waiver.¹¹ Pursuant to Section 1.925 of the Commission's Rules, Pass Word's Request showed unique circumstances supporting grant of the waiver.¹² Furthermore, we concluded that granting the waiver did not undermine the purpose of the rule because we found credible Pass Word's explanation of its mistake.

⁶ See Petition at 2

⁷ *Id.* at 2.

⁸ See Petition at 3.

⁹ See "Commission Announces That Mutually Exclusive 'Short Form' Applications (Form 175) to Participate in Competitive Bidding Process ('Auctions') Are Treated as Exempt for Ex Parte Purposes," 9 FCC Rcd. 6760, DA 94-283 (rel. November 7, 1994) ("*1994 Public Notice*"). As this *1994 Public Notice* states, the Commission believes it is desirable to facilitate and encourage a free flow of information between applicants and the Commission staff concerning the wide-ranging questions about Commission procedures and requirements that apply to competitive bidding.

¹⁰ *Id.* at 4.

¹¹ 47 C.F.R. § 1.925.

¹² *Id.* See also Pass Word's Request at 1.

5. Cook also argues Pass Word's original application "was a significant factor in Cook's auction strategy, including the determination of its up front payment."¹³ Cook further maintains that if the waiver grant is not rescinded in its entirety, it should be modified to allow Pass Word to add only the AU channel to its application in each of the four MEAs, because Cook argues this is the only channel in which Pass Word has "a cognizable interest."¹⁴ Cook states that applicants, including itself, planned their auction strategy based at least in part on an evaluation of the other applications to determine the number of bidding units to acquire, and they did this without any knowledge of Pass Word's Request. Nevertheless, several other applicants selected all or some of the licenses in markets added by Pass Word pursuant to the *Waiver Letter*, and no other applicant has claimed any resulting prejudice.¹⁵

6. We remain convinced that the grant of Pass Word's request is in the public interest.¹⁶ Accordingly, we are not persuaded by Cook's arguments that Pass Word's waiver should be rescinded, or modified to add only the AU channel to its application in each of its four MEAs. Consequently, we deny Cook Telecom, Inc.'s Petition for Reconsideration.

7. IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. SS 151, 154(i), 154(j), 303(r), that Cook Telecom, Inc.'s Petition for Reconsideration of Action Taken Pursuant to Delegated Authority filed on February 18, 2000, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Mark Bollinger
Acting Chief, Auctions and Industry Analysis
Wireless Telecommunications Bureau

¹³ See Petition at 4.

¹⁴ *Id.* at 2, 9.

¹⁵ See "Auction of 2,499 – 929 and 931 MHz Paging licenses, Status of Applications to participate in the Auction," *Public Notice*, DA-00173 (rel. February 1, 2000) ("*Status PN*").

¹⁶ 47 C.F.R. 1.925; See also *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert denied*, 409 U.S. 1027 (1972).