



FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

DA 01-2709
December 21, 2001

Mr. Carl W. Northrop
Paul Hastings Janofsky & Walker, LLP
1299 Pennsylvania Avenue, N.W., 10th Floor
Washington, DC 20000-2400

Dear Mr. Northrop:

This letter responds to the Request for Refund ("Request") filed by Vodafone AirTouch Licenses LLC ("Vodafone")¹ in connection with certain licenses it purchased in Auction No. 26.² Specifically, Vodafone argues that some of the licenses it acquired in that auction were not the subject of mutually exclusive applications. Accordingly, Vodafone requests that the Commission deem the auction cancelled with respect to those licenses and refund the associated payments made by Vodafone in the amount of \$258,400.³ For the reasons discussed below, we deny Vodafone's Request.

In Auction No. 26, Vodafone was the high bidder on 78 licenses in 36 market areas. The Commission granted to Vodafone all 78 licenses for which it made full and timely payment.⁴ Of the 78 licenses won by Vodafone, 76 licenses (the "Licenses") were acquired for the minimum opening bid amounts.

In its Request, Vodafone contends that the Licenses were not the subject of mutually exclusive applications. In support of this contention, Vodafone points out that no other applicant placed a competing bid on any of the Licenses at any time during the auction.⁵ Vodafone further argues that the aggregate bidding eligibility of all the qualified bidders in Auction No. 26 was not sufficient for each license to receive even one minimum bid, let alone two competing bids.⁶ Vodafone states that 60 percent of all of the licenses in the auction received no bids at all.⁷ In addition, Vodafone asserts that the Licenses are for areas and frequencies where Vodafone or its affiliates is an existing licensee with substantial coverage and that, therefore, the Licenses would be of no apparent benefit to other carriers who would be obligated to protect

¹ See Request of Vodafone AirTouch Licenses LLC for a Partial Refund of Payments Made in Auction Event No. 26, filed July 12, 2000.

² Auction No. 26 offered 2,499 licenses in 51 Major Economic Areas ("MEA"): 612 "929 MHz licenses" (twelve 929 MHz licenses in each MEA) and 1,887 "931 MHz licenses" (thirty-seven 931 MHz licenses in each MEA).

³ Request at 2-4.

⁴ See "Wireless Telecommunications Bureau Announces It Is Prepared to Grant 929 and 931 MHz Paging Auction Licenses After Final Payment is Made," *Public Notice*, 15 FCC Rcd 8070 (2000); "Wireless Telecommunications Bureau Grants 929 and 931 MHz Paging Auction Licenses," *Public Notice*, 15 FCC Rcd 10677 (2000).

⁵ Request at 2.

⁶ *Id.* at 3-4.

⁷ *Id.* at 4.

the incumbent Vodafone system.⁸ Vodafone further contends that new entrants did not bid on the licenses won by Vodafone and that many of the incumbent paging carriers focused their bids on frequencies for which they already held licenses.⁹ Vodafone concludes that because no other applicants bid on the Licenses, no other applicants were interested in acquiring them and, therefore, the Licenses were not the subject of mutually exclusive applications.¹⁰

Contrary to Vodafone's assertions, mutual exclusivity is not determined during the bidding in an auction. Rather, the Commission determines mutual exclusivity prior to auction, at the time that short-form (FCC Form 175) applications are accepted for filing.¹¹ Short-forms are ordinarily filed at least 30 days prior to the commencement of an auction. Applicants are required to indicate on their short-form applications the license(s) on which they may wish to bid. If more than one applicant selects the same license on applications that are accepted for filing, mutual exclusivity exists with respect to those short-form applications. Once the Commission determines that mutual exclusivity exists between applications, that determination is not altered by bidder activity during an auction. Thus, if a license has been selected on at least two short-forms, the license is considered to be the subject of mutually exclusive applications, even if only one applicant, or no applicant, bids on the license.¹² In the instant case, more than one applicant selected each of the 76 licenses at issue. Therefore, the Licenses were the subject of mutually exclusive applications for purposes of competitive bidding.

In the competitive bidding *Second Report and Order*, the Commission established that it determines mutual exclusivity at the time that short-form applications are filed.¹³ Further, in the *Paging Second Report and Order*, the Commission made clear that where only one short-form application is filed for a particular market, the Commission will conclude that mutual exclusivity does not exist for that market.¹⁴ Specifically, the Commission made the following statement:

⁸ *Id.* at 3.

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ Section 309(j) of the Communications Act requires the Commission to assign licenses through an auction when "mutually exclusive applications are accepted . . ." 47 U.S.C. § 309(j)(1).

¹² See Letter to J. Dominic Monahan, Esq., Counsel to Rob Allen Hauser, from Margaret Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, re: Request for Refund of Upfront Payment for MX Group FM 130 in Closed Broadcast Auction No. 25, DA 01-144 (rel. January 19, 2001) (concluding that mutual exclusivity is determined at the time short-form applications are accepted for filing).

¹³ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2376 ¶ 165 (1994).

¹⁴ See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Implementation of Section 309(j) of the Communications Act — Competitive Bidding, PP Docket No. 93-253, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732, 2794, ¶ 127 (1997) ("*Paging Second Report and Order*").

“If we receive only one application that is acceptable for filing for a particular market, and thus there is no mutual exclusivity, we will issue a Public Notice cancelling the auction for that license and establish a date for the filing of a long-form application”¹⁵

Conversely, therefore, if more than one application is filed for a specific market, as was the case with respect to the Vodafone Licenses, the Commission will find that mutual exclusivity does exist. Vodafone mistakenly relies on language in a DBS rulemaking, which is virtually identical to that quoted above, and which also makes clear that mutual exclusivity is determined at the short-form filing stage and not during bidding.¹⁶ Thus, we reject Vodafone’s contention that bidder activity contributes to the determination of mutual exclusivity. In addition, Vodafone’s assertion that no bidders, other than Vodafone, had any intention or desire to bid on the Licenses is speculative. Vodafone cannot assert with any certainty that if it had not submitted its bids, another bidder would not have subsequently submitted bids on the Licenses. The most that can be inferred from the bidding activity on the Licenses is that no applicant was interested in bidding more than the minimum opening bid amounts for any of the Licenses.

Vodafone further argues that the Commission should grant its Request for Refund regardless of whether the Commission’s auction rules for the paging services are upheld in *Benkelman Telephone Co. v. F.C.C.*¹⁷ Specifically, Vodafone contends that if the auction rules are upheld, the Commission still retains the discretion to waive the payment requirement in circumstances where the Commission finds it to be in the public interest. We note that since the filing of Vodafone’s Request, the D.C. Circuit has upheld the Commission’s paging auction rules.¹⁸ In the instant case, Vodafone argues that the post-auction bidding information provides a compelling basis for the Commission to exercise its discretion in favor of a refund of Vodafone’s license payments. We disagree. Although the Commission does retain the discretion to waive certain payment requirements in circumstances where it is found to be in the public interest, we are not persuaded that a refund of payments in this case would serve the public interest. Vodafone fails to demonstrate how refunding the winning bids on the 76 licenses would further any of the public interest objectives set forth in Section 309(j)(3).¹⁹ Moreover, we believe that waiving our payment rules in this instance would undermine the integrity of the auctions program. A bidder assumes a binding obligation to pay its full bid amount upon acceptance of the high bid at the close of an auction.²⁰ We believe that it is in the public interest to hold Vodafone responsible for its winning bids.

¹⁵ *Id.*

¹⁶ Request at 5; Vodafone cites to Revisions and Rules and Policies for the Direct Broadcast Satellite Services, IB Docket No. 95-168, *Report and Order*, 11 FCC Rcd 9712, 9776, ¶ 158 (1995), in which the Commission states that “[i]n any case where we have scheduled an auction and it turns out that only one application is filed for a particular construction permit, we will cancel that auction and process the application.”

¹⁷ Request at 6.

¹⁸ See *Benkelman Telephone Company, et al. v. Federal Communications Commission*, 220 F.3d 601 (D.C. Cir. 2000), *petition for rehearing denied* (Oct. 25, 2001) (concluding that the Commission’s obligation to avoid mutual exclusivity under Section 309(j)(6)(E) did not foreclose adoption of a new licensing scheme that could result in the filing of mutually exclusive applications).

¹⁹ 47 U.S.C. § 309(j)(3).

²⁰ 47 C.F.R. § 1.2104(g)(2).

Accordingly, on the basis of the record before us, we are not persuaded that Vodafone has demonstrated circumstances to justify the grant of its Request. This action is taken under the delegated authority pursuant to Section 0.331 of the Commission's rules.²¹

Sincerely,

Margaret Wiener
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

²¹ 47 C.F.R. § 0.331.