



FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

DA 00-683
March 24, 2000

Mr. John Prendergast
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, N.W.
Washington, DC 20037

Dear Mr. Prendergast:

This letter responds to the Requests for Waiver and Request for Leave to Amend that you filed on March 22, 2000 on behalf of three of your clients: Townes Telecommunications, Incorporated; North Dakota Network Company; and PVT Networks, Incorporated (collectively as "Applicants").¹ Applicants are seeking permission to amend their FCC Form 175 ("short-form application") for participation in Auction No. 30 to add 39 GHz license frequency blocks A through N within the market service areas specified in their applications.² Specifically, Applicants request a waiver of Section 1.2105 (b)(2) of the Commission's rules to permit a change to frequencies within the market service areas identified on their short-form applications.³ According to Applicants, they intended to select all the 39 GHz license blocks for the market service areas in which they actually selected only one license block. Absent a waiver, Applicants would be ineligible to bid on all 39

¹ See Request for Waiver by Townes Telecommunications, Inc. and Request for Leave to Amend, filed March 22, 2000; Request for Waiver by North Dakota Network Co. and Request for Leave to Amend, filed March 22, 2000; Request for Waiver by PVT Networks, Inc. and Request for Leave to Amend, filed March 22, 2000 (collectively as "Requests").

² Townes Telecommunications, Inc. selected the following market service areas in its short-form application: BEA029, Jacksonville, FL-GA; BEA030, Orlando, FL; BEA031, Miami-Ft. Lauderdale, FL; BEA032, Fort Myers-Cape Coral, FL; BEA033, Sarasota-Bradenton, FL; BEA034, Tampa-St. Petersburg, FL; BEA035, Tallahassee, FL-GA; BEA036, Dothan, AL-FL-GA; BEA073, Memphis, TN-AR-MS-KY; BEA087, Beaumont-Port Arthur, TX; BEA088, Shreveport-Bossier City, LA; BEA090, Little Rock-North Little Rock, AR; BEA091, Forth Smith, AR-OK; BEA092, Fayetteville-Springdale-Rodgers, AR; BEA093, Joplin, MO-KS-OK; BEA094, Springfield, MO; BEA095, Jonesboro, AR-MO; BEA096, St. Louis, MO-IL; BEA097, Springfield, IL-MO; BEA098, Columbia, MO; BEA099, Kansas City, MO-KS; BEA100, Des Moines, IA-IL-MO; BEA118, Omaha, NE-IA-MO, BEA121, North Platte, NE-CO; BEA127, Dallas-Fort Worth, TX-AR; BEA128, Abilene, TX; BEA129, San Angelo, TX; BEA130, Austin-San Marcos, TX; BEA131, Houston-Galveston, TX; BEA132, Corpus Christi, TX; BEA133, McAllen-Edinburg-Mission, TX; BEA134, San Antonio, TX; BEA135, Odessa-Midland, TX; BEA136, Hobbs, NM-TX; BEA137, Lubbock, TX; BEA138, Amarillo, TX-NM; BEA140, Pueblo, CO-NM; BEA141, Denver-Boulder-Greeley, CO; BEA155, Farmington, NM-CO; and BEA157, El Paso, TX-NM. North Dakota Network Co. selected the following market service areas in its short-form application: BEA110, Grand Forks, ND-MN; BEA111, Minot, ND; BEA112, Bismarck, ND-MT-SD; and BEA113, Fargo-Moorhead, ND-MN. PVT Networks, Inc. selected the following market service areas in its short-form application: BEA136, Hobbs, NM-TX; BEA155, Farmington, NM-CO; and BEA157, El Paso, TX-NM.

³ 47 C.F.R. § 1.2105(b)(2).

GHz license blocks in those market service areas because all of those licenses were not properly selected on their short-form applications. For the reasons discussed below, we grant Applicants' Requests.

To obtain a waiver of the Commission's competitive bidding rules,⁴ Applicants must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.⁵

In support of their Requests, Applicants argue that they intended to select all 39 GHz frequency blocks for those market service areas specified in their short-form application to create the maximum opportunity to win enough spectrum blocks to accommodate broadband services (*i.e.*, frequency blocks A through N, corresponding to 39 GHz channels 1 through 14). Specifically, counsel for Applicants contend that when he submitted Applicants' short-form applications using the Commission's submission software, he believed he had selected all fourteen 39 GHz frequency blocks for the designated BEA markets. Applicants contend that, because of the confusing format of the auction software, compounded by the format of the license list in the related *Auction No. 30 Public Notice*,⁶ Applicants' choice of frequencies was not reflected in the final submission.

In particular, counsel for Applicants claims that when he reviewed this listing of 39 GHz licenses prior to preparing for the electronic filing, he saw that the licenses corresponding to 39 GHz frequency blocks A-N were listed in a single block corresponding to each market number and license name, and mistakenly concluded that this "all frequency block" grouping was similarly reflected in the short-form application submission software. Counsel for Applicants contends that he did not affirmatively select frequency block "A" when composing the markets for bidding eligibility, believing that all frequency blocks would be included by its choice of a particular BEA market. Counsel for Applicants claims that it was only after reviewing the release of the *Auction No. 30 Status Public Notice*⁷ that he realized that the software automatically defaults to frequency block A when a particular BEA is selected. Accordingly, Applicants argue that they should be permitted to correct their applications to specify all of the frequency blocks for which they intend to bid. Applicants contend that a prohibition against correcting their applications would be fundamentally unfair since their applications were already accepted for filing, and such action

⁴ 47 C.F.R. § 1.2105(b)(2).

⁵ 47 C.F.R. § 1.925.

⁶ See "Auction of Licenses for Fixed Point-to-Point Microwave Service in the 38.6 to 40.0 GHz (39 GHz) Band; Auction Notice and Filing Requirements for 2,450 Licenses in the 39 GHz Band Scheduled for April 12, 2000: Minimum Opening Bids and Other Procedural Issues," *Public Notice*, DA 00-112 (rel. January 21, 2000) ("*Auction No. 30 Public Notice*").

⁷ See "Auction of Licenses for Fixed Point-to-Point Microwave Service in the 38.6 to 40.0 GHz (39 GHz) Band; Status of Applications to Participate in the Auction," *Public Notice*, DA 00-615 (rel. March 17, 2000) ("*Auction No. 30 Status Public Notice*").

would not be prejudicial to any other party. Applicants further argue that allowing them to amend their application will serve the public interest as it will create greater competition.

We note that the *Auction No. 30 Public Notice* did include precise frequencies related to license blocks within spectrum to be auctioned.⁸ Therefore, Applicants were on notice of the frequencies related to the separate license blocks within each market area for the 39 GHz band. Nevertheless, we note that the software selection format and instruction mechanisms for the 2,450 licenses in the 39 GHz band were complex and may have contributed to Applicants' misunderstanding. We find that Applicants' explanation of their mistake is credible and that granting this waiver will not undermine the purpose of the rule.

Section 1.2105(b)(2) states that a major amendment cannot be made after the initial filing deadline, and this includes changes in license service areas identified on an applicant's short-form application. We continue to interpret this rule to prohibit applicants from adding markets to their short form applications, unless a waiver of the rules is warranted. The facts presented in Applicants' Requests show unique circumstances supporting the grant of these waivers pursuant to⁹ Consequently, we will permit Applicants to amend their short-form applications to add the licenses listed in their Requests, and these amendments will allow Applicants to bid on those licenses.

This action is taken under the delegated authority pursuant to Section 0.331 of the Commission's rules.¹⁰

Sincerely,

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

⁸ See *Auction No. 30 Public Notice* at 5-6.

⁹ 47 C.F.R. § 1.925.

¹⁰ 47 C.F.R. § 0.331.