

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
TWO WAY RADIO OF CAROLINA, INC. )  
 )  
Request for Waiver of )  
47 C.F.R. § 1.2105(b)(2) )

**MEMORANDUM OPINION AND ORDER**

Adopted: July 20, 1999

Released: July 22, 1999

By the Commission:

**I. Introduction**

1. The Commission has before it an Application for Review filed by Two Way Radio of Carolina, Inc. ("Two Way Radio") on February 20, 1997.<sup>1</sup> Two Way Radio seeks review of an Order by the Chief of the Wireless Telecommunications Bureau ("Bureau") denying Two Way Radio's request to change its designated entity status in connection with the 900 MHz Specialized Mobile Radio ("SMR") auction that began on December 5, 1995 and concluded on April 15, 1996.<sup>2</sup> For the reasons set forth below, we deny Two Way Radio's Application for Review.

**II. Background**

2. Prior to the 900 MHz SMR auction, a Public Notice released on September 15, 1995, announced that short-form applications (FCC Form 175) would be due on October 26,

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<sup>1</sup> Two Way Radio of Carolina, Inc., Request for Waiver of 47 C.F.R. § 1.1205(b)(2), Application for Review (filed Feb. 20, 1997) ("Application for Review").

<sup>2</sup> Two Way Radio of Carolina, Inc., Request for Waiver of 47 C.F.R. § 1.1205(b)(2), *Order*, 12 FCC Rcd 958 (1997) ("*Bureau Order*"). Under 47 C.F.R. § 1.2110, "designated entities" include small businesses, rural telephone companies, and minority- and women-owned businesses.

1995, and stated that applicants were required to indicate their small business status on their application.<sup>3</sup> Section 90.814 of the Commission's rules provides for two categories of small businesses for the 900 MHz SMR auction: (1) entities with average gross revenues of not more than \$3 million for the three preceding years, and (2) entities with average gross revenues of not more than \$15 million for the three preceding years.<sup>4</sup> Bidders in the first category were eligible for a larger bidding credit and a more favorable installment payment plan than bidders in the second category.<sup>5</sup> On its short-form application, Two Way Radio claimed eligibility as a small business with gross revenues of not more than \$15 million. When the auction closed on April 15, 1996, Two Way Radio was the high bidder for Licenses YS006G and YS006T in the Charlotte, North Carolina, Major Trading Area.

3. On April 29, 1996, Two Way Radio asked the Bureau's Auctions Division ("Division")<sup>6</sup> to waive Section 1.2105(b)(2) of the Commission's rules,<sup>7</sup> which prohibits major amendments to short-form applications, and permit it to change its status to a small business with average gross revenues of not more than \$3 million.<sup>8</sup> In its Waiver Request, Two Way Radio asserted that: (1) it had insufficient time to complete an audit of its income before the short-form

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<sup>3</sup> See Public Notice, Report No. AUC-95-07, Auction No. 7, released Sept. 15, 1995. The auction actually commenced on December 5, 1995. *Public Notice*, Mimeo No. 60654, released Nov. 13, 1995, announced a change in the start of the auction to December 4, 1995, in the event of a government-wide shutdown. A further *Public Notice*, released Nov. 20, 1995, announced that the auction would commence on December 5, 1995.

<sup>4</sup> 47 C.F.R. § 90.814.

<sup>5</sup> 47 C.F.R. §§ 90.810 and 90.812. Under the rules, an entity having not more than \$3 million in gross revenues was entitled to: (i) use a bidding credit of 15 percent to lower the cost of its winning bid; and (ii) make interest-only payments for five years, with interest to accrue at the U.S. Treasury note rate, and payments of interest and principal to be amortized over the remaining five years of the license term. An entity having gross revenues of not more than \$15 million was entitled to: (i) use a bidding credit of 10 percent to lower the cost of its winning bid; and (ii) make interest-only payments for the first two years of the license term, with interest to accrue at the U.S. Treasury note rate plus an additional 2.5 percent, and payments of interest and principal to be amortized over the remaining eight years of the license term.

<sup>6</sup> On May 11, 1997, the Auctions Division was redesignated the Auctions and Industry Analysis Division.

<sup>7</sup> *Id.* at 3-4. Section 1.2105(b)(2) of the Commission's rules provides:

The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. Form 175 may be amended or modified to make minor changes or correct minor errors in the application (such as typographical errors). The Commission will classify all amendments as major or minor, pursuant to rules applicable to specific services.

An application will be considered to be a newly filed application if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines. 47 C.F.R. § 1.2105(b)(2).

<sup>8</sup> Two Way Radio of Carolina, Inc., Request for Waiver, Application of Two Way Radio of Carolina, Inc. for Authority to Construct and Operate a CMRS Station in the 900 MHz Band (filed Apr. 29, 1996) ("Waiver Request").

application filing deadline; (2) a more accurate representation of its financial records showed that it qualified as a small business with average gross revenues of not more than \$3 million; and (3) its requested change in status could be accepted as a minor amendment without prejudice to any other party.

4. In a letter dated July 30, 1996, the Division denied Two Way Radio's Waiver Request, finding that: (1) because of the significant benefits that the two small business categories confer on bidders, modification of an applicant's small business status does not constitute a minor change under Section 1.2105(b)(2) of the Commission's rules; (2) Two Way Radio had not shown that its request involved "unique circumstances," as required by Section 90.151 of the Commission's rules; and (3) the 42-day period between announcement of the auction and the short-form filing deadline gave Two Way Radio enough time to review its financial records and prepare its application.<sup>9</sup>

5. On August 29, 1996, Two Way Radio sought reconsideration of the *Division Letter*.<sup>10</sup> In its Petition for Reconsideration, Two Way Radio argued that: (1) pursuant to Section 1.65(a) of the Commission's rules, it was obligated to ensure that its pending application remained accurate; (2) its proposed amendment was minor under Sections 1.2105(b)(2) and 90.164 of the Commission's rules because the requested change would not affect any other party; and (3) the short-form application deadline did not allow it sufficient time to accurately calculate its gross revenues. Two Way Radio also argued that the Commission should follow the Internal Revenue Service ("IRS") practice of refunding taxpayer overpayments caused by a taxpayer's mistake.<sup>11</sup> As an alternative to the full relief that it requested of the Division, Two Way asked to change its installment payment plan to the one available to smaller businesses in lieu of the higher bidding credit.

6. On January 21, 1997, the Bureau denied Two Way Radio's Petition for Reconsideration, once again concluding that modification of an applicant's small business status does not constitute a minor change under Sections 1.2105(b)(2) and 90.164 of the Commission's rules.<sup>12</sup> The Bureau found that Two Way Radio's request would require the Commission to give

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<sup>9</sup> See Letter to Terry J. Romine, Esquire, and Pamela Gaary, Esquire, Counsel for Two Way Radio, from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau (July 30, 1996) ("*Division Letter*").

<sup>10</sup> Two Way Radio of Carolina, Inc., Petition for Reconsideration, Request for Waiver of Section 1.2105(b)(2) of the Commission's Rules (filed Aug. 29, 1996) ("*Petition for Reconsideration*").

<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Bureau Order*, 12 FCC Rcd at 961-962. Section 90.164 provides, in relevant part, that: "In general, a major filing is a request for Commission action that has the potential to affect parties other than the applicant." The rule then lists the following as major filings: (a) initial station authorization; (b) substantial change in ownership or control; (c) renewal of authorizations; (d) authorization for an activity having a significant environmental effect; (e) filings that request or change

it different and more favorable benefits after the auction closed and might have affected actions, strategies, and bids of other bidders.<sup>13</sup> The Bureau also held that the requirement of Section 1.65(a) to maintain the accuracy and completeness of applications does not transform Two Way Radio's major change into a minor one.<sup>14</sup> The Bureau also rejected Two Way Radio's argument that it should be permitted to amend its application because the IRS permits taxpayers to amend their returns to obtain refunds of overpayments.<sup>15</sup> The Bureau found Two Way Radio's reliance on IRS tax refund policy misplaced, because, unlike a bidder's change in small business status, a taxpayer's change in status does not affect the obligations of other taxpayers.<sup>16</sup> It also rejected Two Way Radio's alternative request for a more favorable installment payment plan, because, like bidding credits, a bidder's entitlement to a particular plan affects the bidder's valuation of the license and its bids and, consequently, the bids of other bidders during an auction.<sup>17</sup> Finally, the Bureau found that the period allowed for preparing and filing applications for the 900 MHz SMR auction was adequate and that the importance of ensuring the integrity of the auction process outweighs the financial burdens Two Way Radio may bear as a result of its own filing error.<sup>18</sup>

7. On February 20, 1997, in response to the Bureau's denial of its petition, Two Way Radio filed the Application for Review that is now before us. In its Application for Review, Two Way Radio contends that the Bureau did not apply the same standards to its request for relief as were applied in cases where similar requests for relief were granted.<sup>19</sup> For the reasons discussed below, we deny Two Way Radio's Application for Review.

### III. Discussion

8. After carefully reviewing the record, we find no justification to overturn the *Bureau Order*. Two Way Radio's request for waiver sought a change that would require the Commission

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various engineering/technical matters, such as a change in frequency, increase in effective radiated power or antenna height, or relocation of an existing fixed transmitter. 47 C.F.R. § 90.164.

<sup>13</sup> *Bureau Order*, 12 FCC Rcd at 962.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 963.

<sup>18</sup> *Id.*

<sup>19</sup> Application for Review at 4-5.

to afford Two Way Radio post-auction benefits different from those initially elected on its FCC Form 175. We agree with the Bureau that modification of an applicant's small business status does not constitute a minor change under our competitive bidding rules, and that providing Two Way Radio with more favorable financial benefits after the close of the auction, based on information not available to other bidders during the auction, would adversely affect the integrity of the auction process.<sup>20</sup> The cases upon which Two Way Radio relies to argue that the Bureau applied an incorrect standard are plainly distinguishable.

9. In its pleading, Two Way Radio first argues that in deciding whether to grant relief, the Commission has not held auction applicants to a "letter-perfect" standard, but that such a standard was nevertheless applied to its request. In support of its position, Two Way Radio cites decisions in *NextWave Personal Communications*<sup>21</sup> and *PCS 2000*,<sup>22</sup> that permitted auction participants to cure defects that could have resulted in dismissal of their applications and prevented them from obtaining the licenses they won at auction. although Two Way is correct that the Commission has previously declined to adopt a "letter-perfect" standard for its review of short-form applications,<sup>23</sup> Two-Way Radio's interpretation of these decisions is overly broad. In the *Competitive Bidding Fifth Report and Order*, we explained that our purpose in not utilizing a "letter-perfect" standard was to provide applicants with an opportunity to correct minor defects in their short-form applications.<sup>24</sup> However, as the Bureau correctly decided, modification of an applicant's small business status to obtain more favorable benefits after the conclusion of the auction is not a minor

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<sup>20</sup> See, e.g., Letter to Linda Feldmann, Esq. from Kathleen O'Brien Ham, Chief, Auctions & Industry Analysis Division, Wireless Telecommunications Bureau, DA-97-2261 (October 24, 1997).

<sup>21</sup> Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses, *Memorandum Opinion and Order*, 12 FCC Rcd 2030 (WTB 1997) ("*NextWave*"). The Bureau found that NextWave exceeded the foreign ownership benchmark of Section 310(b)(4) of the Communications Act of 1934, as amended, but nonetheless determined that it was in the public interest to grant NextWave the 63 licenses it won in the C block broadband PCS auction, conditioned on NextWave's restructuring to conform its foreign ownership to the statutory benchmark within six months from the date of the Public Notice granting the licenses.

<sup>22</sup> Applications of PCS 2000, L.P. For Broadband Block C Personal Communications Systems Facilities, *Memorandum Opinion and Order*, 12 FCC Rcd 1681 (1997) ("*PCS 2000*"). An officer and registered bidding agent of PCS 2000 had misrepresented facts and submitted false documents to the Commission in an attempt to cover up a mistaken bid ten times greater than intended. PCS 2000 removed those persons responsible for the misrepresentations from ownership and control and filed an amendment to its application reflecting the change in its ownership structure. The Commission permitted the major amendment to PCS 2000's application pursuant to Section 24.823(g)(3) of the Commission's rules, which allows major amendments reflecting only changes in ownership or control that the Commission finds to be in the public interest.

<sup>23</sup> See In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532, 5559 ¶¶ 63-64 (1994).

<sup>24</sup> See *id.* at 5559 ¶ 63.

change within the meaning of Sections 1.2105(b)(2) and 90.164 of our rules.<sup>25</sup> During the 900 MHz SMR auction, other bidders placed bids based upon their understanding of the specific bidding credit and the type of installment payment plan to which Two Way Radio, as well as other bidders, were entitled. Thus, we agree with the Bureau's determination that a change in Two Way Radio's small business status constitutes a major change.

10. Two Way Radio asserts that the Bureau's interpretation of Section 90.164 is unreasonable and inconsistent with Commission rules or practice. It argues that the more favorable financial benefits it seeks would no more adversely affect the integrity of the auction process than the foreign capital contributions of NextWave that were in excess of the statutory benchmark.<sup>26</sup> We disagree. *NextWave* and *PCS 2000* are inapposite as both cases involved the issue of an applicant's qualifications for the licenses at the long-form stage. In both cases, the Bureau allowed changes that permitted them to qualify as licensees. These matters did not directly affect their own bidding strategies or the information about license values that would affect other bidders' strategies. Moreover, our decision in *PCS 2000* must be distinguished, because the amendment PCS 2000 requested was specifically addressed by a regulation that exempts applications with major amendments from being treated as "newly filed" if the amendment reflects a change in ownership or control that the Commission finds to serve the public interest.<sup>27</sup> Additionally, although Two Way Radio claims that its request to cure the "defect" in its application has been held to a more stringent standard than PCS 2000, we note that in the latter case, our decision to allow the application amendment was accompanied by the Commission's imposition of a \$1 million forfeiture for bid withdrawal during the auction.<sup>28</sup>

11. Two Way Radio also relies on a group of Bureau holdings referred to as the *Default Waiver Orders* in which the Bureau granted requests for waiver of down payment deadlines submitted by winning bidders in the 900 MHz SMR and C block broadband Personal Communications Service auctions.<sup>29</sup> Two Way Radio contends that the administrative errors in

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<sup>25</sup> 47 C.F.R. § 1.2105(b)(2), 90.164.

<sup>26</sup> Application for Review at 6-8.

<sup>27</sup> See 47 C.F.R. § 24.823(g)(3).

<sup>28</sup> See Applications of PCS 2000, L.P., For Broadband Block C Personal Communications Systems Facilities, *Notice of Apparent Liability for Forfeiture*, 12 FCC Rcd 1703 (1997).

<sup>29</sup> Two Way Radio cites Bureau orders addressing waiver requests of winning bidders in the 900 MHz SMR and C block broadband Personal Communications Services ("PCS") auctions, as follows: *AMK International, Inc.*, 12 FCC Rcd 1511 (WTB 1997); *Cenkan Towers, L.L.C.*, 12 FCC Rcd 1516 (WTB 1997); *Electronic SMR Communication Services*, 12 FCC Rcd 1520 (WTB 1997); *Independence Excavating, Inc.*, 12 FCC Rcd 1524 (WTB 1997); *Hickory Telephone Company, Inc.*, 12 FCC Rcd 1528 (WTB 1997); *The Wireless, Inc.*, 12 FCC Rcd 1821 (WTB 1997); *Roberts-Roberts & Associates, LLC*, 12 FCC Rcd 1825 (WTB 1997); *Southern Communications Systems, Inc.*, 12 FCC Rcd 1532 (WTB

making timely second down payments are similar to its miscalculation of its gross revenues.<sup>30</sup> We are unpersuaded by Two Way's argument. The various waivers in the *Default Waiver Orders* were sought for simple miscalculations, inadvertence, administrative errors, or similar complications involving the making of second down payments or installment payments. In none of those cases did the applicant seek to effect a change that would result in granting the applicant a different status or affording the applicant greater financial benefits than it had requested in its application. The waivers granted to the applicants in the *Default Waiver Orders* also did not affect the other bidders in that auction. Thus, grant of those waivers was based on determinations that the waivers would not undermine the integrity of the auction process. Consequently, we agree with the Bureau that allowing Two Way Radio to change its small business status after the close of the auction would be a major change that would have an impact upon the other bidders in that auction, and consequently undermine the integrity of the auction itself.

12. Two Way Radio further argues that the Bureau considered a "good faith" compliance standard in granting relief in *NextWave* and the *Default Waiver Orders*, but that Two Way Radio was not given such consideration.<sup>31</sup> It claims there is no evidence that its error was other than a "good-faith" miscalculation based on misunderstanding the definition of "revenues," similar to *NextWave's* misunderstanding of the definitions of "equity" and "debt."<sup>32</sup> We reject this argument that it is entitled to change its small business status based on its record of "good faith" compliance. An applicant's good faith is merely one factor, to be balanced against others, when evaluating a request for relief. In this case, we find that any good faith efforts on the part of Two Way Radio do not override our primary concern for maintaining the integrity of the competitive bidding process.

13. We also reject Two Way Radio's argument that it should be allowed to change its small business classification after the close of the auction because the Bidder Information Package

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1997); *RFW, Inc.*, 12 FCC Rcd 1536 (WTB 1997); *MFRI, Inc.*, 12 FCC Rcd 1540 (WTB 1997); *Wireless Telecommunications Company*, 12 FCC Rcd 1544 (WTB 1997); *CSS Communications, Co.*, 12 FCC Rcd 1507 (WTB 1997); and *Longstreet Communications International, Inc.*, 12 FCC Rcd 1549 (WTB 1997). It quotes language from paragraph six of each case referencing Section 90.151 (for those 900 MHz SMR cases) and from Section 24.819 (for those Broadband C Block PCS cases):

[A] waiver request must demonstrate either "that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest," or "that the unique facts and circumstances in a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest."

<sup>30</sup> Application for Review at 10-11.

<sup>31</sup> Application for Review at 8-9, 11.

<sup>32</sup> *Id.* at 8-9.

for the 900 MHz SMR auction did not explicitly prohibit it. Prospective bidders in the 900 MHz SMR auction received the same notice of small business eligibility criteria, and all were on notice of the restrictions in our rules on making major changes to applications.<sup>33</sup> Moreover, the Bureau has stated in prior orders that applicants are responsible for maintaining current information regarding Commission rules, which may be obtained from several sources, including public notices.<sup>34</sup> Two Way is not entitled to rely upon the Bidder Information Package solely as its source for interpretation of the Commission's auction rules and procedures.

14. Finally, Two Way Radio argues that it should have been granted its alternative request, under which it proposed to forgo the additional five percent bidding credit that it would receive if it were classified as an entity having average gross revenues of less than \$3 million, in exchange for receipt of the more favorable installment payment plan that is afforded such entities.<sup>35</sup> It equates its relinquishing of the additional five percent bidding credit to a penalty that would be equal to the five percent late fee assessed the petitioners in the *Default Waiver Orders*.<sup>36</sup> We decline to grant Two Way Radio's alternative request, because we disagree with Two Way Radio that such a result can be equated to the five percent late fee we imposed in the *Default Waiver Orders*. We do not view our decision to require Two Way Radio to retain its original small business classification as a payment that the Commission imposes on the applicant.

15. We are not persuaded that in denying Two Way Radio's waiver request, the Bureau has applied a different standard to Two Way Radio than it has to other license winners. Two Way Radio has not shown the existence of unique facts or circumstances in its case that would warrant a waiver of Section 1.2105(b)(2) of our rules.<sup>37</sup> Two Way Radio has demonstrated neither that the underlying purpose of the rule would be frustrated if it were not permitted to amend its application, nor that the requested amendment would serve the public interest. To the contrary, the circumstances in this case constitute those that the Commission intended to avoid when it required applicants to specify their designated entity status on their short-form applications. Were we to allow winning bidders to amend their applications to obtain more favorable small business treatment after the close of an auction, it would be possible for a bidder to use the amendment process as a mechanism to gain unfair advantage over other bidders in the auction. Accordingly, we affirm the Bureau's finding that ensuring the integrity of the competitive bidding process outweighs any financial burden that Two Way Radio may bear as a result of its own filing error.

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<sup>33</sup> See *Public Notice*, Report No. AUC-95-07, Auction No. 7, released September 15, 1996.

<sup>34</sup> *AMK International*, 12 FCC Rcd at 1514 ¶ 9.

<sup>35</sup> Application for Review at 12.

<sup>36</sup> *Id.*

<sup>37</sup> See 47 C.F.R. § 90.151.

**IV. Ordering Clauses**

16. Two Way Radio has failed to make any of the showings necessary to warrant reversal under Section 1.115 of the Commission's Rules.<sup>38</sup> Accordingly, it is ORDERED that Two Way's Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>38</sup> 47 C.F.R. § 1.115.