

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

In the Matter of)
)
Wilderness Communications, LLC)
Request for Waiver of)
Section 90.805 of the)
Commission's Rules)

ORDER

Adopted: August 5, 1998

Released: August 5, 1998

By the Chief, Wireless Telecommunications Bureau:

1. The Wireless Telecommunications Bureau ("Bureau") has before it a Request for Waiver of Section 90.805 of the Commission's Rules¹ filed by Wilderness Communications, L.L.C. ("Wilderness").² By this Order, we grant a partial waiver based on Wilderness' request. In addition, this Order assesses a bid withdrawal payment of \$4,000.00 for License M002-L (Los Angeles/San Diego, California) in the 900 MHz Specialized Mobile Radio Service ("SMR") auction.³

2. Background. On December 5, 1996, in Round 2 of the 900 MHz SMR auction, Wilderness submitted a bid of \$67,010 for License M002-L. In Round 7, following the Commission's release of bidding results to the public, Wilderness withdrew its bid for License

¹47 C.F.R. §§ 90.805(a) and 90.805(b). See also 47 C.F.R. § 1.2104(g)(1).

²Wilderness Communications, LLC, "Request for Waiver - Timely Action Requested" (filed April 17, 1996) ("Request for Waiver") and attached "Declaration of J. Stacy Davidson" (April 17, 1996) ("Davidson Declaration").

³The license ultimately was awarded to RAM Mobile Data USA Limited Partnership.

M002-L and contacted Commission staff to report that its bid had been in error. On April 15, 1996, the 900 MHz SMR auction closed.⁴ On April 17, 1996, Wilderness filed a "Request for Waiver" of the bid withdrawal payment provisions applicable to the 900 MHz SMR auction. In its Waiver Request, Wilderness alleges that it intended to submit a bid in the amount of \$6,710.00. As in other cases of so-called "fat finger bidding," Wilderness claims that the inclusion of the extra zero resulted from a key punch error. Accordingly, Wilderness argues that it is entitled to a waiver of the bid withdrawal payment because the bid was an obvious error during an early stage of the process. Wilderness also claims that the Commission's auction software contributed to its error. Finally, Wilderness asserts that the purpose of the Commission's rules -- to deter strategic bidding -- will not be undercut by the grant of a waiver in these circumstances.

3. Discussion. At the time Wilderness submitted its erroneous bid, the Commission's bid withdrawal payment provisions did not contemplate erroneous, unintentional bids.⁵ In the subsequent *Atlanta Trunking Orders*, the Commission reviewed the status of unintentional and mistaken bids and provided guidance for determining waiver calculations.⁶ These decisions delegated authority to the Bureau to grant waivers and reductions of bid withdrawal payments on a case-by-case basis.⁷ Waivers or reductions are permissible in instances where there is no evidence of insincere or frivolous bidding or other acts of bad faith related to the actual bid.⁸ A complete waiver is available where the Commission's software is directly responsible for the error.⁹ Where the Commission's software is not at fault, the *Atlanta Trunking Orders* permit reductions only when the bidder has withdrawn the allegedly erroneous bid within two rounds of submission.¹⁰

⁴ "FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas: Down Payments Due April 22, 1996, FCC Form 600s Due April 29, 1996," *Public Notice*, DA 96-586 (rel. April 15, 1996).

⁵ See e.g., 47 C.F.R. §§ 1.2104(g)(1), 24.704(a) and 90.805(a) (1996 versions)

⁶ See *Atlanta Trunking Associates, Inc., and MAP Wireless, L.L.C., Requests to Waiver Bid Withdrawal Payment Provisions*, *Order*, 11 FCC Rcd. 17189 (1996); and *Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Petition for Reconsideration of Bid Withdrawal Payment, and Georgia Independent PCS Corporation, Application for Review of Request to Waive Bid Withdrawal Payment*, *Memorandum, Opinion and Order*, 12 FCC Rcd 6382 (1997) (hereinafter referred to as "*1996 Atlanta Trunking Order*" and "*1997 Atlanta Trunking Order*," respectively, or jointly as the "*Atlanta Trunking Orders*").

⁷ *1996 Atlanta Trunking Order* at ¶ 21 and *1997 Atlanta Trunking Order* at ¶ 7.

⁸ *Id.*

⁹ *1997 Atlanta Trunking Order* at ¶ 11.

¹⁰ In the *1996 Atlanta Trunking Order*, the Commission set forth the formula for determining bid payments as follows: (1) if a mistaken bid is withdrawn in the round immediately following the round in which it was submitted, and

4. We find that Wilderness has failed to demonstrate that a complete waiver of Section 90.805 is warranted. Wilderness has not demonstrated that the Commission's bidding software contributed to its erroneous bid in the same manner as those parties who were granted complete waivers of the Commission's bid withdrawal rules in its *1997 Atlanta Trunking Order*. Specifically, those parties granted complete waivers in the *1997 Atlanta Trunking Order* all showed that the mistaken bids which they submitted were made using the "Go to market" function in the Commission's remote bidding system, which automatically placed a zero next to the cursor in the field in which the bid was submitted.¹¹ These errors resulted in a bid that was exactly ten times as high as intended, when the bidder failed to delete the extra zero.¹² In contrast, the extra decimal in Wilderness' bid is not at the end of the number, and was not due to the "Go to market" function in the bidding system. This error was due primarily to carelessness on Wilderness' part.

5. Moreover, Wilderness is precluded from requesting a bid reduction under the strict application of the *Atlanta Trunking Orders* criteria. Although there is no evidence that Wilderness' bidding error was deliberate, Wilderness did not withdraw its bid until Round 7, a full five rounds after it was placed. The early withdrawal requirement is of great significant here because erroneous bidders failing to notice their errors increase the potential for damaging the economic efficiency of the auction process.¹³

6. Under the Commission's guidelines in the *Atlanta Trunking Orders*, Wilderness would be liable for a bid withdrawal payment of \$30,958.50. Instead, we will assess a \$4,000.00 bid withdrawal payment in keeping with our June 12, 1998 letter and Dismissal *Order* reducing the bid withdrawal payment for ClearComm, L.P. ("ClearComm").¹⁴ As with Wilderness, Clearcomm's conduct did not fit four-square into the criteria established in the *Atlanta Trunking*

the auction is in Stage I or Stage II, the withdrawal payment will be the greater of two times the minimum bid increment during the round in which the bid was submitted or the standard bid payment calculated as if the bidder had made a bid one increment above the minimum accepted bid. If a mistaken bid is withdrawn two or more rounds following the round in which it was submitted, the bidder is not eligible for a reduction. See *1996 Atlanta Trunking Order* at ¶ 18.

¹¹ *1997 Atlanta Trunking Order* at ¶ 11.

¹² *Id.*

¹³ *Id.* at ¶¶ 17-19.

¹⁴ See Letter from Wireless Telecommunications Bureau Chief Daniel B. Phythyon to Tyrone Brown, Senior Vice President of ClearComm, L.P., DA 98-1074 (rel. June 12, 1998); see also In the Matter of ClearComm, L.P., Request for Waiver of 47 C.F.R. § 24.704(a)(1), Dismissal of Application for Review, *Order*, DA 98-1081 (rel. June 12, 1998)(hereinafter "*ClearComm Letter*" and "*ClearComm Order*," respectively).

Orders, but the totality of the circumstances presented compelling reasons for an equitable reduction.¹⁵ Accordingly, we will reduce Wilderness' liability in a proportionate amount.¹⁶

7. In reducing Wilderness' bid withdrawal payment, we note that most of the factors essential for bid withdrawal reduction cited in the *Atlanta Trunking Orders* and the *ClearComm Letter* are present here. Wilderness' conduct was unintentionally erroneous, it withdrew immediately upon discovery of its error (albeit five rounds later), the error occurred during an early phase of the auction, and the auction process corrected itself to prevent harm caused by the erroneous bid. The Bureau also determined that this withdrawal did not result in an alteration of the ultimate winning bid amount. Although these factors indicate that a reduction of the payment is warranted, we are mindful of the Commission's finding that erroneous bids may have a negative impact on the auctions process.¹⁷ An erroneous bid may distort the price information generated by the auction process and reduce efficiency.¹⁸ Distortions and inefficiency in such circumstances may result regardless of whether the bid was the result of an innocent error or was strategically placed.¹⁹

8. We do find, however, that changed circumstances since the issuance of the *Atlanta Trunking Orders* mitigate in favor of Wilderness. As we noted in the *ClearComm Letter*, the Commission has implemented "click box bidding" in an effort to improve the auction process and eliminate erroneous bids.²⁰ Also, the electronic bidding format has been modified to limit withdrawals. As a result, the possibility of future erroneous bids has been substantially reduced and the Commission has declared that prior policy directed at combatting speculative and strategic bidding is moot.²¹

9. In light of these facts, we conclude that the guidelines set forth in the *Atlanta Trunking Orders* and the *ClearComm Letter* permit a partial grant of Wilderness' Request for Waiver. As

¹⁵*Id.*

¹⁶*ClearComm Letter* at p. 2.

¹⁷1996 *Atlanta Trunking Order* at ¶ 14.

¹⁸*Id.*

¹⁹*Id.*

²⁰*ClearComm Letter* at p. 2.

²¹*Id.* at p. 3; *see also* In the Matter of Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, WT Docket No. 97-82, (rel. December 31, 1997) at ¶ 147.

such, Wilderness is liable for a \$4,000.00 bid withdrawal payment for its bid for License M002-L. This amount is proportionate to the amount of the reduction in the *ClearComm* case.

ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the Request for Waiver filed by Wilderness Communications, L.L.C., IS GRANTED IN PART.

11. IT IS FURTHER ORDERED that Wilderness Communications, L.L.C., is assessed a bid withdrawal payment in the amount of \$4,000.00 for License M002-L (Los Angeles/San Diego, California).

12. IT IS FURTHER ORDERED that this amount will be deducted from the funds which Wilderness Communications, L.L.C., has remaining on deposit with the Commission. This action is taken pursuant to delegated authority, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Daniel B. Phythyon
Chief, Wireless Telecommunications Bureau