

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

In the Matter of)	
)	
TPS UTILICOM, INC.)	File Nos. 0000365277
)	0000365279
Request for Waiver of Sections 1.2109 and 1.2107)	
of the Commission's Rules Regarding BTA043,)	
BTA127, BTA215, and BTA330)	

ORDER

Adopted: July 30, 2001

Released: July 31, 2001

By the Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On February 23, 2001, TPS Utilicom, Inc. (TPS) filed a request for waiver of the Commission's rules¹ requiring it to make its down payment on licenses for which it was the winning bidder in the C and F Block Broadband PCS Auction (Auction No. 35).² For the reasons discussed below, we deny the waiver request. We also assess TPS an initial default payment in the amount of \$414,510, set forth default payment obligations and procedures for TPS,³ and dismiss the above-captioned applications.

II. BACKGROUND

2. On January 29, 2001, three days after the close of the auction, the Wireless Telecommunications Bureau (Bureau) released a *Public Notice* announcing the Auction No. 35 winning bidders and the down payment instructions for the licenses.⁴ Specifically, the *Closing PN* instructed winning bidders to submit to the Commission the additional funds necessary to bring their total deposits (not including upfront payments applied to satisfy bid withdrawal or default payments) up to twenty percent of their high bid(s). The payment deadline for such deposits was no later than 6:00 p.m. Eastern Standard Time (EST) on February 12, 2001.⁵

¹ 47 C.F.R. §§ 1.2107, 1.2109.

² See TPS' Petition for Waiver, filed Feb. 23, 2001 (TPS Petition).

³ See 47 C.F.R. §§ 1.2107, 1.2109.

⁴ See C and F Block Broadband PCS Auction Closes, *Public Notice*, DA 01-211 (rel. Jan. 29, 2001) (*Closing PN*).

⁵ See *id.* at 2. Attachment B to the *Closing PN* advised winning bidders of the exact amounts of payments due on their accounts.

3. TPS, an applicant claiming status as a “very small business,”⁶ was the winning bidder for four C Block licenses.⁷ TPS’ net high bids for these licenses totaled \$13,817,000. Prior to the start of the auction, TPS submitted to the Commission an upfront payment in the amount of \$1,036,000.⁸ Under the Commission’s rules, TPS was required to make an additional deposit of \$1,727,400, to bring its total deposit up to \$2,763,400 by February 12, 2001.⁹ TPS failed to make this additional deposit.

4. Although TPS failed to deposit any additional funds with the Commission, it did timely file two electronic FCC Form 601 applications for the four licenses for which it was the winning bidder.¹⁰ In these applications, TPS alleges that “the auction process was skewed by the participation of unqualified bidders in [c]losed [m]arkets.”¹¹ Accordingly, TPS suggests that the Commission should hold \$494,200 of its upfront deposit as a good faith down payment on the two licenses that it won in “closed” bidding until, as requested by TPS, the Commission determines the proper participation and bid amounts in such markets.¹² Since it does not dispute its bid amounts for the licenses it won in “open” bidding, TPS

⁶ For purposes of bidding credits in Auction No. 35, a very small business is an entity that, together with its affiliates and controlling interests, has average gross revenues that are not more than \$15 million for the preceding three years. See 47 C.F.R. §§ 24.712(b), 24.717(b), 24.720(b). A winning bidder in Auction No. 35 that qualifies as a very small business may use a bidding credit of 25 percent to lower the cost of its winning bid for a license offered in “open bidding.” See 47 C.F.R. §§ 24.712(b), 24.717(b). See also In the Matter of Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16,266, 16,287-88 ¶ 44 (2000) (“*PCS Sixth Report and Order*”) (bidding credits available for “open” but not “closed” bidding); *infra* note 11 (explaining the two types of bidding).

⁷ TPS was the winning bidder for licenses in the following Basic Trading Areas (BTAs): Binghamton, New York, BTA043 (channel block C1), Elmira-Corning-Hornell, New York, BTA127 (channel block C1), Jamestown-Dunkirk, New York, BTA215 (channel block C3), and Olean, New York, BTA330 (channel block C3).

⁸ TPS submitted its upfront payment of \$1,036,000 on November 27, 2000.

⁹ See *Closing PN*, Attachment B.

¹⁰ See Forms 601, dated February 12, 2001, filed by TPS (collectively, TPS Form 601), each containing an attachment entitled “Exhibit I: Designation of Funds Held in Trust.” TPS filed one form 601, File No. 0000365279, for BTA215 and BTA330, for which it claimed tribal land bidding credits. The other Form 601, File No. 0000365277, for BTA043 and BTA127, does not include a request for tribal land bidding credits. The two applications otherwise are substantively identical. On May 14, 2001 TPS amended its Form 601 in File No. 0000365279 to include certifications, pursuant to section 1.2110(f)(3)(ii) of the Commission’s rules, 47 C.F.R. § 1.2110(f)(3)(ii), supporting its request for tribal land bidding credits.

¹¹ TPS Form 601, Exhibit I. While TPS refers to “closed markets,” in Auction No. 35 some markets included both licenses available in “closed” bidding and licenses available in “open” bidding. To bid on licenses available in “closed” bidding, bidders must qualify as entrepreneurs, those that, together with their affiliates and persons or entities that hold interests in the applicants and their affiliates, have less than \$125 million in gross revenues in either of the past two years prior to the auction, and less than \$500 million in total assets. See 47 C.F.R. § 24.709; *PCS Sixth Report and Order*, 15 FCC Rcd at 16,282 ¶ 30. Licenses offered in “open” bidding are available to all bidders, regardless of size. The Commission recently removed entrepreneur restrictions for some, but not all, licenses available in Auction No. 35 and in future C and F Block auctions. See *id.*, 15 FCC Rcd at 16,276 ¶ 20 (explaining which licenses remained subject to entrepreneur eligibility restrictions -- *e.g.*, available only in “closed” bidding -- and which ones were not subject to such restrictions -- *e.g.*, available in “open” bidding.).

¹² See TPS Form 601, Exhibit I. See also *supra* note 11 (explaining that Auction No. 35 had “closed” bidding by licenses rather than by markets).

purports to designate \$286,050 of its upfront payment as the down payment for the Jamestown, New York (BTA215) license and \$255,750 for the Olean, New York (BTA330) license.¹³

5. Following the filing of its long-form applications and the down payment deadline, TPS filed the instant petition for waiver of the Commission's down payment rules. In its filing, TPS argues that a strict application of the down payment rules in this instance would not serve their underlying purpose, which it claims is "to discourage insincere bidding during auctions."¹⁴ TPS contends that its unilateral "designation of good faith funds, in addition to [its] timely filing of the required long-form applications, indicate a sincere effort to comply with the Commission's rules and auction procedures."¹⁵ TPS further claims that the public interest would be served by the grant of its request for waiver because it intends to deploy its service principally to provide basic, emergency and police telecommunications services to Native Americans on First Nation Reservations.¹⁶ TPS also argues that a waiver in this instance is appropriate because of the unique facts and circumstances that would render application of the rules unduly burdensome and contrary to the public interest. Specifically, TPS claims that allowing certain unspecified, unqualified applicants to bid on closed licenses inflated the bid amounts for those licenses and resulted in "unduly burdensome excess down payment amounts," thereby frustrating the purpose of the Commission's entrepreneurial small business auction restrictions.¹⁷

III. DISCUSSION

6. Section 1.2107(b) of the Commission's rules requires a winning bidder to submit, within 10 business days after being notified that it is a high bidder on a particular license(s), a down payment in the amount necessary to bring its total deposits up to twenty percent of its high bid(s).¹⁸ Section 1.2109(b) of the Commission's rules provides that if a winning bidder fails to remit the required down payment within the time allowed, the bidder will be in default, its application will be dismissed, and it will be liable for the default payment specified in § 1.2104(g)(2).¹⁹ TPS seeks a waiver of these rules.

7. The Commission may grant a waiver request if it is demonstrated that (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest; or (2) the "unique or unusual circumstances of the instant case" make application of the rules "inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative."²⁰

¹³ *See id.*

¹⁴ TPS Petition, at 3-4.

¹⁵ *Id.*

¹⁶ *See id.* at 4-5. We note that TPS did not request a tribal land bidding credit in its application for the two closed bidding licenses for BTA127 and BTA043, Elmira and Binghamton, New York, respectively. *See* TPS Form 601.

¹⁷ *See* TPS Petition, at 5.

¹⁸ 47 C.F.R. § 1.2107(b).

¹⁹ 47 C.F.R. § 1.2109(b).

²⁰ 47 C.F.R. § 1.925(b)(3)(ii).

8. For the reasons discussed below, we find that TPS has not established a basis for the requested waiver, and that TPS is subject to default payment obligations resulting from its failure to remit the required down payment amount on its winning bids. By failing to submit the necessary funds to the Commission to bring its total deposits up to twenty percent of its high bids, TPS violated section 1.2107(b) of the Commission's rules, and, pursuant to section 1.2109(b), defaulted on the licenses for which it was a winning bidder.²¹ As the Commission has explained previously, it "does not waive the first down payment deadline because its strict enforcement is essential to protect the integrity of the auctions process by preventing insincere bidding and to determine the financial qualification of a new licensee to provide communications services."²²

9. An underlying purpose of section 1.2107 is to allow the Commission to determine that the applicant possesses the basic financial resources to deploy services using the licenses for which it was the high bidder.²³ This, in turn, is consistent with the purposes of the Commission's statutory competitive bidding authority. Congress gave the Commission the authority to auction radio spectrum licenses in order to effect particular policies and goals, among which is to promote the rapid deployment of new technologies, products, and services to the American public while recovering for the public the value of that spectrum.²⁴ Section 309(j) of the Communications Act of 1934, as amended ("Communications Act"), specifically includes a presumption that licenses should be assigned by auction to those who place the highest value on the use of the spectrum.²⁵ Such entities are presumed to be those best able to put the

²¹ 47 C.F.R. §§ 1.2107(b), 1.2109(b).

²² See In the Matter of BDPCS, *Memorandum Opinion and Order*, 12 FCC Rcd 15,341, 15,343 ¶ 4 (1997) ("BDPCS") (Commission's default payment provisions encourage a bidder to withdraw its bid at the time its financing becomes insecure and applicant's financial problems occurring prior to close of auction did not constitute special circumstances justifying a waiver request of applicant's first down payment); Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 9 FCC Rcd 6384, 6384 ¶ 5 (1994) (high bidders are required to make a down payment, in part, "to ensure payment of the default penalty if default subsequently occur[s]") (citing In the Matter of Implementation of Section 309(j) of the Communications Act--Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2381 ¶ 190 (1994) ("*Competitive Bidding Second Report and Order*")); In the Matter of Application of Phoenix Data Communications, Inc., *Order on Reconsideration*, 14 FCC Rcd 21,122, 21,124 ¶ 5 (PSPWD 1999) ("*Phoenix Data*") (waiver request for first down payment denied; PSPWD emphasized that delayed down payment would allow winning bidders to shop their licenses and undermine integrity of auction); See also In the Matter of National Telecom PCS, Inc., *Order on Reconsideration of Memorandum Opinion and Order*, 14 FCC Rcd 18,822, 18,826 ¶ 9 (1999) ("*National Telecom*") (long-form application dismissed for failure to submit timely first down payment), *aff'd*, National Telecom Inc. v. FCC, No. 99-1506, 2000 WL 1584572 (D.C. Cir. Oct. 4, 2000) (unpublished opinion). See generally *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999) (affirming the Commission's rationale behind enforcing payment deadlines). In that opinion, the court stated that "[h]aving established a more lenient payment structure for designated entities, which by definition usually faced problems of accessing financial resources, the Commission could reasonably focus on the importance of meeting payment deadlines to deter such entities from abusing the lenient structure by 'shop[ping]' a winning bid in order to obtain financing for a payment.' The Commission also could reasonably rely on strict enforcement of the deadlines to provide an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public." *Id.*, 197 F.3d at 518 (citations omitted).

²³ See In the Matter of Implementation of Section 309(j) of The Communications Act--Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, 13 FCC Rcd 15,920, 15,979 ¶ 152 (1998).

²⁴ See 47 U.S.C. § 309(j)(3)(A), (C).

²⁵ See 47 U.S.C. § 309(j)(3).

licenses to their most efficient use.²⁶

10. As the Commission has explained previously, it is reasonable to expect that winning bidders will remit their initial down payments timely, given that it is their first opportunity to demonstrate to the Commission their ability to make payments towards the licenses they won.²⁷ Additionally, strictly enforcing its down payment requirements gives the Commission the option, relatively soon after the auction has closed, of re-auctioning the spectrum or offering it to the other highest bidders (in descending order) at their final bids.²⁸ While the Commission consistently has denied requests to waive first down payment deadlines, it occasionally has determined that some flexibility may be appropriate to address a minor delinquency with respect to second down payments, particularly where inadvertence has played a part in the delay.²⁹ However, even in the case of second down payments, it is essential that applicants demonstrate their ability to pay.³⁰ Moreover, the Commission has recognized that, unlike first down payments, the second down payment does not affect the Commission's review of the applicant's qualifications.³¹ In this case, we note, TPS has made only an upfront payment prior to the start of the auction and thus has not made any demonstration as a winning bidder that it has the requisite financial qualifications to speed service to the public or to put the spectrum to its most efficient use.³²

11. Not only is the timing of the down payment designed to require a winning bidder to establish its financial qualifications early, but it also is designed to protect the integrity of the auction process. Requiring licensees to demonstrate an ability to pay as a condition of granting licenses,

²⁶ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2358, 2361 ¶¶ 58, 71.

²⁷ See *BDPCS*, 12 FCC Rcd 15,341; *National Telecom*, 14 FCC Rcd 18,822; In the Matter of Licenses of 21st Century Telesis, Inc., *Petition for Reconsideration*, FCC 00-434 (rel. Dec. 2000) (“*Telesis*”); In the Matter of Grand Connectivity, L.L.C., *Order*, 14 FCC Rcd 13,943 (1999) (“*Grand Connectivity*”); In the Matter of CH PCS, Inc., *Order*, In the Matter of C.H. PCS, Inc. Dismissal of Seven Broadband PCS C Block Long Form Applications for Auction Event No. 5, *Memorandum Opinion and Order*, 14 FCC Rcd 9652 (WTB 1999) (“*CH PCS Inc.*”) (denying request for waiver of first down payment deadline).

²⁸ See 47 C.F.R. § 1.2109(b).

²⁹ See In the Matter of Carolina PCS, *Memorandum Opinion and Order*, 12 FCC Rcd 22,9389 (1997) (waiver of second down payment granted where applicant, subsequent to its Petition for Waiver, demonstrated its ability to pay within two days of payment deadline); In the Matter of RFW, Inc., *Order*, 12 FCC Rcd 1536, 1538 ¶ 8 (WTB 1997) (request for waiver of second down payment granted where applicant committed inadvertent error in calculating amount and had history of compliance); In the Matter of Independence Excavating, Inc., *Order*, 12 FCC Rcd 1524, 1526 ¶ 8 (WTB 1997) (request for waiver of second down payment deadline granted, where applicant had initially deposited an amount sufficient to cover second down payment, but Commission sent back a portion of that amount shortly before second down payment deadline; applicant had a history of compliance, and had inadvertently concluded no down payment was due).

³⁰ In the Matter of Mountain Solutions Ltd., Inc., *Order on Reconsideration of Memorandum Opinion and Order*, 13 FCC Rcd 21,983, 21,986 ¶ 6, 21,990 ¶ 14 (1998) (“*Mountain Solutions*”) (waiver request for second down payment denied where applicant failed to show it had financial resources to make payment on due date).

³¹ *Phoenix Data*, 14 FCC Rcd at 21,124 ¶ 5.

³² The competitive bidding provisions of the Communications Act do not relieve an applicant of the obligation to comply with other provisions of the Act, including those relating to qualifications of applicants. See 47 U.S.C § 309 (j)(6)(B). See also 47 U.S.C. § 308(b) (requiring applicants to show financial qualifications as prescribed by Commission regulations).

promotes a fair and efficient licensing process for all participants in our auctions, including those who won licenses in the auction and those who did not, and fosters economic opportunity and competition in the marketplace.³³ Moreover, it eliminates the possibility that insincere bidders who lack financial resources to deploy systems can shop their newly won licenses to gain financing. To do otherwise, could open the auction up to speculators, and at the same time could discourage legitimate bidders from participating. As the Commission has explained, “[t]he down payment requirement deters insincere bidders from winning licenses solely with the expectation that, post-auction, they can ‘shop’ their winning bid in a late effort to obtain financing. Permitting such action, we have stated, ‘would undermine the integrity of the auction itself.’”³⁴ Accordingly, the Commission consistently has denied requests for waivers of first down payments.³⁵

12. TPS argues that making its upfront payment and filing its long-form applications for all of the licenses that it won in Auction No. 35 demonstrate its good faith and sincerity and supply a basis for grant of a waiver of the down payment and default rules. The fact, however, that TPS complied with certain of our auction rules does not excuse TPS’ failure to comply with others.³⁶ Similarly, TPS’ claims that it intends to provide telecommunications services to Native Americans³⁷ neither excuses its failure to comply with the Commission’s down payment deadlines nor outweighs the public interest benefit in even-handed enforcement of the Commission’s rules. The Commission has demonstrated its commitment to Native Americans by various initiatives to increase the deployment of telecommunications services on tribal lands. These initiatives include improving programs that provide financial incentives and assistance

³³ See In the Matter of Amendment of Part 1 of the Commission’s Rules, Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, 4660-4685 MHz, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 429, 430 ¶¶ 95-96 (1998) (“*Competitive Bidding Third Report and Order*”). See also In the Matter of Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services; Petition for Further Reconsideration of the Denial of Applications for Waiver of the Commission’s Common Carrier Point-to-Point Microwave Radio Service Rules, CC Docket No. 92-297, *Third Order on Reconsideration*, 13 FCC Rcd 4856, 4896 ¶ 91 (1998).

³⁴ See In the Matter of Commercial Realty St. Pete, Inc., James C. Hartley, Teresa Hartley, and Ralph E. Howe, *Memorandum Opinion and Order*, 15 FCC Rcd 7057, 7072 ¶ 15 (1999) (“*Commercial Realty St. Pete*”). See also *Phoenix Data*, 14 FCC Rcd 21,122.

³⁵ See In the Matter of 21st Century Telesis, Inc., *Petition for Reconsideration*, FCC 00-434 ¶ 19 (rel. Dec. 2000) (“*Telesis*”); *BDPCS*, 12 FCC Rcd 15,341, 15,349 ¶ 12; *Phoenix Data*, 14 FCC Rcd 21,122, 21,124 ¶ 5 (citing *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348); *National Telecom*, 14 FCC Rcd at 18,827 ¶ 12; *Commercial Realty St. Pete*, 15 FCC Rcd 7057; Mountain SMR Group, L.L.C., for Authorization to Construct and Operate New Specialized Mobile Radio Service on the 800 MHz Band for License E-172A, the Honolulu, Hawaii A Block Market, *Order* 14 FCC Rcd 3823 (1999); *CH PCS Inc* 14 FCC Rcd 9652; *Grand Connectivity*, 14 FCC Rcd 13,943.

³⁶ The 20% first down payment amount required under section 1.2107(b) of the Commission’s rules is due on all licenses for which the applicant is the winning bidder. See 47 C.F.R. § 1.2107(b) (“high bidder on a particular license(s)” must submit such additional funds as are necessary to bring its total deposits “up to twenty (20) percent of its high bid(s)”).

³⁷ See TPS Petition, at 4-5. TPS also claims to be Native American controlled. See *id.*, at 2, 4 n.2.

for basic local telephone service for low-income residents on tribal lands³⁸ and instituting bidding credits to provide incentives to wireless carriers to serve individuals living on tribal lands.³⁹ Notwithstanding these initiatives, the Commission's auctions process must be both fair and consistent. Maintaining the integrity of the auctions process benefits all applicants, including those that intend to serve, or are otherwise connected with, Native Americans. We therefore conclude that TPS' waiver request does not satisfy the first prong of our test for granting a waiver.

13. We also find that TPS has not shown unique facts and circumstances that would support a waiver under the second prong of our test. TPS argues that the unique facts and circumstances underlying its waiver request consist of the alleged improper participation of certain unspecified bidders in the auction of unspecified "closed" licenses. Such participation, it is alleged, may have skewed the bid prices for licenses where the improper participation occurred.⁴⁰ According to TPS, these skewed bid prices in turn violate the mandate of section 309(j)(3) of the Communications Act.⁴¹

14. To the extent that TPS is objecting to the participation of certain types of entities in Auction No. 35 "closed" bidding, its Petition must be construed as an untimely request for reconsideration of the *PCS Sixth Report and Order*. That *Report and Order* modified the auction and service rules for C and F block PCS licenses and established the standard by which entities were eligible to participate in closed bidding.⁴² Thus, TPS' complaints should have been raised during the pendency of that rulemaking proceeding, and cannot justify a waiver in the present context. To the extent that TPS is objecting to the participation of particular entities in Auction No. 35, a petition to deny against specific applicants, not a request to avoid the down payment for the licenses for which it successfully bid, would be the appropriate forum for challenging such entities.⁴³

15. Finally, TPS alleges that a waiver should be granted based on the allegation that the controlling interest standard, adopted on July 27, 2000, will be interpreted for the first time during Auction No. 35 post auction procedures.⁴⁴ We note, however, that the long-form review for two previous

³⁸ See In the Matter of Federal State Joint Board on Universal Service; Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas, *Twelfth Report and Order, Memorandum and Order, and Notice of Proposed Rulemaking*, 15 FCC Rcd 12,208 (2000).

³⁹ See In the Matter of Extending Wireless Telecommunications Services to Tribal Lands, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 11,794 (2000). See also In the Matter of Statement of Policy on Establishing a Government to Government Relationship with Indian Tribes, *Policy Statement*, FCC 00-207 (rel. June 23, 2000) (stating that Commission intends to work with Indian tribes to ensure that their members have access to communications services).

⁴⁰ See *id.*, at 2, 5.

⁴¹ See *id.*, at 5.

⁴² See *PCS Sixth Report and Order*, 15 FCC Rcd at 16,285 ¶ 30.

⁴³ We note that TPS did indeed file two Petitions to Deny in Auction No. 35, against DCC PCS, Inc. (File No. 0000365171) and Alaska Native Wireless, L.L.C. (File Nos. 0000363827, 0000364320). Those Petitions will be dealt with in a separate order. See Petitions to Deny, dated March 9, 2001, filed by TPS.

⁴⁴ TPS Petition, at 6.

auctions has taken place under the auspices of those rules.⁴⁵ Moreover, we used the same controlling interest principles in the attribution rules applied in a number of previous auctions, including in the LMDS, 800 MHz SMR, 220 MHz, VHF Public Coast and LMS services.⁴⁶ In any event, the possibility that the Commission would be asked to address such issues in petitions to deny filed against other applications does not justify TPS' failure to comply with the payment obligation for its own applications. Accordingly, TPS' Petition fails to demonstrate unique facts and circumstances that would justify a waiver of the Commission's rules.

16. TPS' failure to remit the required down payment within ten business days after the release of the Public Notice directing it to do so renders it in default. As a result, TPS now is subject to the default payment provisions specified in section 1.2104(g)(2) of the Commission's rules.⁴⁷ Specifically, TPS is liable for a default payment equal to the difference between the amount that it bid and the amount of the winning bids the next time the spectrum associated with the defaulted licenses is auctioned by the Commission.⁴⁸ TPS is also liable for an additional payment equal to three percent of its defaulted bid or the subsequent winning bids, whichever is less.⁴⁹ In the event that the total amount of the subsequent winning bids is greater than or equal to TPS' defaulted bid, the total default payment is equal to three percent of TPS' defaulted bid.⁵⁰

17. Because we cannot fully determine the amount of TPS' default payment until we re-auction the spectrum associated with the licenses upon which TPS defaulted, we assess a deposit toward the default payment in the amount of three percent of the total amount of its defaulted bids. Accordingly, by this Order, we assess an initial default payment of \$414,510, three percent of TPS's winning bids in the auction.⁵¹ Pursuant to section 1.2107(b) of the Commission's rules, we will apply TPS' upfront payment to satisfy this initial default payment obligation.⁵² The remaining default payment will be assessed once a new bid price for the spectrum associated with the defaulted licenses is established in a

⁴⁵ See 800 MHz Specialized Mobile Radio (SMR) Service Frequencies in the Lower 80 Channels Auction Closes, Winning Bidders Announced, *Public Notice*, DA 00-2254 (rel. Dec 7, 2000); 700 MHz Guard Bands Auction Closes, Winning Bidders Announced, *Public Notice*, DA 00-2154 (rel. Sept. 25, 2000).

⁴⁶ See In the Matter of Amendment of Part 1 of the Commission's Rules Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15324 (2000) ¶ 59 & n.194 (citing 47 C.F.R. § 101.1112 (LMDS); 47 C.F.R. § 90.912 (800 MHz SMR); 47 C.F.R. § 90.1021 (220 MHz); 47 C.F.R. § 80.1252(c) (Public Coast); 47 C.F.R. § 90.1103(c) (LMS)).

⁴⁷ See 47 C.F.R. §§ 1.2104(g), 1.2109(b).

⁴⁸ See 47 C.F.R. §§ 1.2109(b), 1.2104(g). The default payment amount, in the event a bidding credit applies, is calculated on the difference between the net bid amounts or the gross bid amounts, whichever is less. See 47 C.F.R. §§ 1.2109(b), 1.2104(g)(2).

⁴⁹ See *id.*

⁵⁰ See 47 C.F.R. § 1.2109(c).

⁵¹ The Commission has the discretion to assess an initial default payment in an amount up to twenty percent of the defaulting bidder's winning bid. See *Competitive Bidding Third Report and Order*, 13 FCC Rcd 374, 434 ¶ 102 (1998).

⁵² See 47 C.F.R. §§ 1.2107(b), 1.2104(g).

subsequent auction. If an additional payment is required, a further order will assess such payment.⁵³

IV. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and section 1.925(b)(3) of the Commission's rules, 47 C.F.R. § 1.925(b)(3), the request to waive sections 1.2107(b) and 1.2109(b) of the Commission's rules, 47 C.F.R. §§ 1.2107(b), 1.2109(b), filed by TPS Utilicom, Inc. on February 23, 2001, IS DENIED.

19. IT IS FURTHER ORDERED that, pursuant to sections 0.331, 1.2104(b) and 1.2107(b) of the Commission's rules, 47 C.F.R. §§ 0.331, 1.2104(b), 1.2107(b), TPS Utilicom, Inc. is assessed an initial default payment in the amount of \$414,510, and we will apply TPS Utilicom, Inc.'s upfront payment to satisfy this initial default payment obligation.

20. IT IS FURTHER ORDERED that, pursuant to sections 1.2107(b) and 1.2104(g) of the Commission's rules, 47 C.F.R. §§ 1.2107(b), 1.2104(g), TPS Utilicom, Inc. will be subject to the balance of the default payment once the spectrum associated with the defaulted C Block licenses in BTA043, BTA127, BTA215 and BTA330 is re-auctioned and the full default payment is determined.

22. IT IS FURTHER ORDERED that, pursuant to sections 0.331 and 1.2104(b) of the Commission's rules, 47 C.F.R. §§ 0.331, 1.2109(b), the above-captioned applications of TPS Utilicom, Inc. are DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Paul D'Ari
Chief, Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau

⁵³ See *Mountain Solutions*, 13 FCC Rcd at 21,997, 21,983 ¶ 25.