Before the

FEDERAL COMMUNICATIONS COMMISSION DA 95-2292
Washington, D.C. 20554

In the Matter of)

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Amendment of Parts 21 and 74 of
)
the Commission's Rules With
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Regard to Filing Procedures in the
) MM Docket No. 94- 13 1
Multipoint Distribution Service
)
and in the Instructional Television
)
Fixed Service
)
)
and
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)
Implementation of Section 3 09(j)
) PP Docket No. 93-253
of the Communications Act --
)
Competitive Bidding
)
)

ORDER

Adopted: November 3. 1995

Released: November 3, 1995

By the Chief, Wireless Telecommunications Bureau:

The Commission, through the Chief of the Wireless Telecommunications Bureau pursuant to delegated authority, on its own motion, waives certain provisions of Sections 1.2105, 2 1.952 and 2 1.953 of the Commission's rules, for purposes of the upcoming Multipoint Distribution Service (MDS) auction scheduled to begin November 13, 1995.

The Wireless Telecommunications Bureau issued a Public Notice on October 26, 1995 clarifying the spectrum auction anti-collusion rules. Subsequent to the release of that Public Notice, the Wireless Telecommunications Bureau, the Mass Media Bureau and the Office of General Counsel received numerous inquiries concerning the Commission's disclosure requirements and anti-collusion rules as they apply to the MDS auction. This Order clarifies the disclosure requirements and anti-collusion rules for the MDS auction and provides applicants with an opportunity to correct their applications to come into compliance with these rules prior to the commencement of the auction.

The Commission established its MDS anti-collusion rules in order to enhance the competitiveness of the MDS auction process and of the post-auction market structure. Pursuant to the MDS anti-collusion rules, applicants should have disclosed the following in their MDS short-form applications (FCC Form 175-M) filed on October 10, 1995: "all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to post-auction market structure." The rules and the FCC Form 175-M application, to be acceptable for filing, also require each applicant to certify "under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to [Section 1.2 105](a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid." Moreover, "Any short-form application that . . . does not contain all requisite certifications is unacceptable for filing and cannot be corrected subsequent to any filing deadline."

Because applicants certified that their applications listed all parties with whom they had entered agreements, arrangements or understandings, MDS applicants may not amend their applications to add parties that were required to be disclosed pursuant to 47 C.F.R. § 1.2 105(a)(2)(viii). To allow this would effectively make the earlier certification false. Moreover, if such newly disclosed agreements, arrangements or understandings resulted from discussions subsequent to the short-form filing deadline, there would be a possible violation of §§ 2 1.953(a) and 1.2105(c) (see below).

We further emphasize that, if an agreement, arrangement or understanding of any kind relating

to the licenses being auctioned had been entered into with a particular party before the short-form filing date, that party must be disclosed, even if the agreement, arrangement or understanding has not been reduced to writing. If the applicant and a particular party did not enter into any type of agreement, arrangement or understanding prior to the short-form filing date, but were only engaged in negotiations or preliminary discussions, the applicant should not have included the name of such party on its application, and may not amend its application to include such party.

After the MDS short-form filing deadline, applicants that have applied for licenses in any of the same BTAs "are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with [each other] unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the applicant's short-form application. Thus, for example, applicants who have applied for licenses in all of the BTAs are prohibited from further discussions with other applicants (except those parties with whom they have entered into agreements or arrangements that have been disclosed on their short form applications) regarding their bids or bidding strategies. The prohibition on discussions after the short-form filing deadline extends to providing indirect information that affects bids or bidding strategy. Prohibited communications also include negotiations with other applicants that are incumbent licensees (not identified in the short-form application) for assignment or transfer of control of licenses for encumbered spectrum. Negotiations concerning the leasing of excess Instructional Television Fixed Service capacity that do not involve transfer or assignment of currently licensed MDS facilities do not appear to be directly related to the BTA authorizations being auctioned or the post-auction market structure. Such communications are likely to provide information about the applicants' bids or bidding strategy and are related to the BTA authorizations being auctioned and the post-auction market structure within the BTA service area. Communications among applicants for the same geographic license areas concerning matters unrelated to the MDS auction are not prohibited after the filing of short-form applications."

If pre-short-form negotiations or discussions did not result in an agreement, arrangement or understanding among the parties, such negotiations or discussions cannot continue after short-form applications have been filed regardless of whether such parties have been disclosed on the short-form application. The ban on communications among applicants concerning matters related to the MDS auction continues until after the winning bidder makes the required down payment. As the Commission has stated, "a prohibition against agreements and alliances concerning bidding between applicants . . . for the same licenses is a prudent deterrent to collusion that should have only a minimal and temporary effect on bidders' flexibility." Even when an applicant has withdrawn its application after the short-form filing deadline, that applicant may not enter into an agreement, arrangement or understanding with another applicant for the same geographic license areas from which the first applicant withdrew.

Even if the applicant discloses on the short-form application parties with whom it has entered into an agreement, arrangement or understanding, thereby permitting discussion3 with those parties, the applicant is nevertheless subject to existing antitrust laws. As discussed in the *Competitive Bidding Fourth* MO&O, under the antitrust laws, the parties to an agreement may not discuss bid prices if they have applied for licenses in the same geographic market. In

addition, agreements between actual or potential competitors to submit collusive, non-competitive or rigged bids are per se violations of Section One of the Sherman Act. Further, actual or potential competitors may not agree to divide territories horizontally in order to minimize competition, regardless of whether they split a market in which they both do business, or whether they merely reserve one market for one and another for the other.

To the extent the Commission becomes aware of specific allegations that may give rise to violations of the federal antitrust laws, the Commission may investigate and/or refer such allegations to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's anti-collusion rules in connection with participation in the auction process may, among other remedies, be subject to the loss of their down payment or their full bid amount, cancellation of their licenses, and may be prohibited from participating in future auctions.

Since the release of the October 26, 1995 Public Notice clarifying the spectrum auction anti-collusion rules, it has come to our attention that there is widespread confusion among MDS applicants regarding the disclosure requirements and the application of the anti-collusion rules and applicants may have received inconsistent interpretations regarding the application of these rules. Accordingly, applicants acting in good faith may have failed to disclose on their short-form applications parties with whom they had entered into agreements, arrangements or understandings relating to the licenses being auctioned or to the post-auction market structure prior to the short-form filing deadline, and may have continued discussions with these undisclosed parties. In addition, applicants may have in good faith disclosed parties with whom they were continuing to negotiate but had not reached an agreement, arrangement or understanding prior to the short-form filing date. Similarly, applicants may have engaged in substantial negotiations prior to the filing deadline but failed to reach an agreement, arrangement or understanding, and therefore did not disclose such parties with whom they continued to have negotiations.

In view of the widespread confusion in the MDS industry regarding the disclosure requirements and the application of the anti-collusion rules, and because the Public Notice clarifying these rules was not released until after the MDS short-form filing deadline, we will grant a limited waiver of the disclosure requirements and application procedures contained in Sections 2 1 952(c); I .2105(a)(2)(vii) through (ix), (b) and (c)(1) and the anti-collusion rules contained in Section 21.953 (a) and (b) as set forth below. We believe that this limited waiver is necessary to enable applicants who relied in good faith on incorrect interpretations of the rules to correct their applications and come into compliance with the rules prior to the commencement of the auction. Grant of this limited waiver is necessary to ensure a fair and efficient auction by allowing all applicants the opportunity to take appropriate action based on an accurate understanding of our rules. In this regard, we will allow applicants who have entered into agreements, arrangements or understandings relating to the licenses being auctioned prior to the short-form filing deadline without disclosing those parties, to amend their applications to include such parties. Applicants will be permitted to make such corrections to their applications until 5:30 p.m. Eastern Time, November 9, 1995, provided they certify, under penalty of perjury, that: (1) the omission was an inadvertent oversight; (2) such agreement, arrangement or understanding was actually entered

into prior to the short-form filing date; and (3) the applicant has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to Section 1.2 1 05(a)(2)(viii), as supplemented, regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid.

We will further provide applicants who disclosed parties with whom they were negotiating or having preliminary discussions but had not reached an agreement, arrangement or understanding additional time to reach such an agreement, arrangement or understanding prior to the commencement of the auction. Similarly, we will provide applicants who had engaged in substantial negotiations prior to the filing of short form applications but had not reached an agreement, arrangement or understanding, and therefore did not disclose such parties on their short-form applications, additional time to reach an agreement, understanding or arrangement and to amend their application to disclose such parties prior to the start of the auction. Such applicants will be permitted to continue negotiations and amend their applications until 5:30 p.m. Eastern Time, November 9, 1995, provided they certify, under penalty of perjury, that (1) they have made a good faith effort to comply with the rules; (2) substantial negotiations with such parties had been undertaken prior to the short-form filing deadline; and (3) the applicant has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to Section 1.2105 (a)(2)(viii), as supplemented, regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid. If no agreement is reached by 5:30 p.m. Eastern Time, November 9, 1995, the applicant must cease ail discussions and negotiations with such parties relating to their bids or bidding strategies until after the auction has ended and winning bidders have submitted the required down payment.

It is important to note that for purposes of the Commission's MDS anti-collusion rules, the term "applicant" includes the entity submitting the application, owners of 5 percent or more of the entity, and all officers and directors of that entity. All corrections to electronically filed applications must be submitted both manually (with the requisite certifications) and electronically no later than 5:30 p.m. November 9, 1995. Applicants who manually filed their applications should submit corrections to their applications (with the requisite certifications) manually. Manually-filed corrections must be submitted to the Office of the Secretary, Attn: Auction 6 Short-Form Processing, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554.

Applicants should also note that if they are ultimately the winning bidder for a particular license, they must include with the long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement, arrangement or understanding the winning bidder had entered into relating to the competitive bidding process prior to the time bidding was completed.

The Commission may waive its rules for good cause shown, in whole or in part. With respect to MDS licenses, the rules state that the Commission will not grant a waiver unless (1) the underlying purpose of the rule would not be served, or would be frustrated, by its application in

the particular case, and that granting the waiver is otherwise in the public interest; or (2) the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. In deciding whether to grant the waiver, we "must articulate with clarity and precision [our] findings and the reasons for [our] decisions." In this instance, we believe the first test is met. The underlying purpose of the MDS anti-collusion rules, to enhance the competitiveness of the MDS auction process and of the post-auction market structure, is not frustrated by granting the limited waiver to all applicants. The waiver expires prior to the start of the auction, so that it will not permit applicants to collude, or to have agreements, arrangements or understandings without disclosing them. Further, we do not believe that disqualifying applicants who in good faith inadvertently violated the anti-collusion rules would further the public interest. The public interest is best served by having as many competitive applicants bidding on the MDS licenses as possible. We believe that this limited waiver is necessary to allow MDS applicants who made good faith efforts to comply with our rules an opportunity to correct their applications and finalize negotiations that they had reason to believe were permissible under our rules prior to the start of the auction.

Accordingly, IT IS ORDERED that the requirements of Sections 21.952(c); 1.2105(a)(2)(vii) through (ix), (b) and (c)(l) and Section 21.953 (a) and (b) ARE WAIVED to the extent described above with respect to short-form applications (Forms 175-M) for the MDS auction.

This action is taken under delegated authority pursuant to Sections 0.13 l(a) and 0.33 1 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney

Chief, Wireless Telecommunications Bureau