

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

In the Matter of
TOTO COMMUNICATIONS, INC.
for Personal Communications Service
License – Basic Trading Area 490F
Guam
File No. 00183-CW-L-97

ORDER

Adopted: October 26, 2000

Released: October 27, 2000

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

I. Introduction

1. This order sets forth the default payment obligations for Toto Communications, Inc. (Toto) resulting from its failure to timely remit the total required payment on a license for which it was the winning bidder in the Personal Communications Service (PCS) auction, Auction No. 10. For the reasons set forth herein, we find that Toto is in default on its full payment obligations with respect to the PCS Block F license in Basic Trading Area (BTA) 490F, Guam.

II. Background

2. On February 19, 1997, the Commission completed its auction of Block F PCS licenses. Toto was the winning bidder of BTA 490F, Guam. After a preliminary review of submitted long-form applications, a number of applications, including Toto's, were accepted for filing. On March 7, 2000, the Bureau released a Public Notice stating that the Bureau was ready to grant the license for BTA 490F, Guam to Toto. The Public Notice stated that payment of the remaining five percent down payment must be received from Toto by March 21, 2000. The Public Notice also stated that if Toto failed to submit its remaining down payment of five percent of its winning bid by March 21, 2000, it would be allowed to make payment within ten days after the payment deadline (i.e. April 4, 2000), provided that it also pays a late fee equal to five percent of the amount due. The Public Notice stated that, pursuant to section

1 See Broadband Personal Communications Services D, E, and F Blocks Service Information, Public Notice, DA 97-356, rel. February 19, 1997.

2 See Commercial Wireless Division of the Wireless Telecommunications Bureau Announces It Is Prepared To Grant Two F Block PCS Licenses, Public Notice, 15 FCC Rcd. 887 (2000).

3 Id.

1.2109(a), 47 C.F.R. § 1.2109(a), if Toto failed to pay the balance of its winning bids by the late payment deadline of April 4, 2000, it would be considered in default on its licenses and subject to the applicable default payments.⁴ Toto did not submit full and timely payment and, thereby, defaulted on its obligation under the Commission's rules.⁵

III. Discussion

3. Under the Commission's rules, a winning bidder that fails to timely remit a required payment is deemed to have defaulted on its auction payment obligations.⁶ The Commission's rules also provide that under such circumstances, the Commission will dismiss the bidder's application.⁷ The announcement of the winning bidder in an auction conducted by the Commission, like the acceptance of high bids in auctions in other settings, terminates the bidding and establishes, as of the moment of the acceptance of the high bid, the binding obligation to pay the winning bid price for the licenses.⁸ Whether a payment default or disqualification thereafter breaches the obligation, the winning bidder's liability remains a function of the high bid and is based on the obligation that was incurred at auction.⁹ Without the default payment rules, a winning bidder might consider adopting a strategy of waiting until the actual license grant before deciding whether or not to accept the license, to the detriment of other bidders and the efficient and fair functioning of the auction process.¹⁰ Thus, the default payment provisions are critical for maintaining the integrity of the auction process by discouraging insincere bidding and ensuring that licenses end up in the hands of those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service.¹¹

4. Accordingly, pursuant to sections 1.2104(g)(2) and 1.2106(c) of the Commission's rules, Toto is subject to default payment obligations.¹² Specifically, Toto is required to pay the difference between

⁴ *Id.*

⁵ 47 C.F.R. § 1.2109 (1999).

⁶ 47 C.F.R. § 1.2109(c) (1999); *see also* National Telecom PCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd. 10163, 10171-72 (¶ 15) (1997); Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd. 374, 434 (¶ 107) (1997) ("*Part 1 Third Report and Order*").

⁷ 47 C.F.R. § 1.2109(b) (1999).

⁸ *In re BDPCS, Inc., Memorandum Opinion & Order*, FCC 00-243, ___ FCC Rcd. ___, ¶ 16 (rel. July 11, 2000) ("*BDPCS*"); *see also Nextwave Personal Communications, Inc. v. FCC*, 200 F.3d 43, 56 (2nd Cir. 1999), *mandate enforced by, In re FCC*, 217 F.3d 125 (2nd Cir. 2000), *cert. denied*, ___ S.Ct. ___, 2000 WL 795201, 68 USLW 3774 (U.S. Oct. 10, 2000).

⁹ *BDPCS* at ¶ 16, n. 66.

¹⁰ *BDPCS* at ¶ 16.

¹¹ *Part 1 Third Report and Order*, 13 FCC Rcd. at 433-34 (¶ 101); *see also*, Requests for Waivers in the First Auction of Interactive Video and Data Service (IVDS) Licenses, *Memorandum Opinion & Order*, 10 FCC Rcd. 12153, 12155 (¶ 9) (1995), *recon. denied*, 11 FCC Rcd. 8211 (1996).

¹² 47 C.F.R. §§ 1.2104(g)(2), 1.2106(e), 1.2109(c) (1999).

the amount bid and the amount of the winning bid the next time the license is offered by the Commission (so long as the subsequent winning bid is less than the defaulted bid), plus an additional payment equal to three percent of the defaulter's bid or the subsequent winning bid, whichever is less.¹³ In the event that the subsequent winning bid is greater than or equal to Toto's defaulted bid, the total default payment is equal to three percent of Toto's defaulted bid.¹⁴ Upfront and downpayment amounts on deposit with the Commission are first applied to default payments before being applied to payments owed on other licenses the bidder seeks to acquire.¹⁵

5. Because the license for market BTA 490F will be included in a future auction, we cannot at this time determine the full amount of the default payment owed by Toto. The Commission has stated that in such instances it will assess an initial default deposit of between three (3) and twenty (20) percent of the defaulted bid price until the full amount of the default payment can be determined.¹⁶ As the Commission noted in a previous case, three percent is the minimum amount that a defaulting winning bidder like Toto could owe even under the most favorable circumstances.¹⁷

6. Therefore, pursuant to Commission practice, we will assess an initial default payment of \$3,847.50, which is three percent of Toto's net winning defaulted bid of \$128,250.00 for the PCS license in BTA 490F.¹⁸ Toto's amount on deposit for upfront and down payments will be applied to this initial default payment. If additional payment is required after BTA 490F is re-auctioned, a second order will be issued to assess the amount due.

IV. Ordering Clause

7. ACCORDINGLY, IT IS ORDERED that, pursuant to sections 4(i) and 309 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309, and sections 0.331 and 1.2104 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.2104(1999), the application for Basic Trading Area (BTA) 490F, Guam, filed by Toto Communications, Inc., IS DISMISSED.

¹³ 47 C.F.R. § 1.2104(g)(1)(1999). *See also* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 00-274, __ FCC Rcd. __, ¶ 15 (rel. Aug. 14, 2000) (wherein the Commission codified its long-standing practice of assessing interim bid withdrawal payments by modifying Section 1.2104(g)(1)).

¹⁴ 47 C.F.R. § 1.2104(g)(2)(1999).

¹⁵ 47 C.F.R. § 1.2106(e)(1999). *See* "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly," *Public Notice*, 11 FCC Rcd. 10853 (WTB: 1996).

¹⁶ In the Matter of Request for Waiver of Section 1.2104(g) of the Commission's Rules Filed by Grand Connectivity, L.L.C., *Order*, 14 FCC Rcd. 13943, 13946 (¶ 6) (WTB: 1999).

¹⁷ Mountain Solutions Ltd., Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets in the Broadband Personal Communications Services (PCS) C Block Auction, *Memorandum Opinion and Order*, 13 FCC Rcd. 21983, 21997 (¶ 25)(1998).

¹⁸ *Id.*; *see also* C.H. PCS, Inc., *Order*, 14 FCC Rcd. 4131, 4133 (¶ 4)(WTB: 1999).

8. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 0.331 and 1.2104(g) of the Commission's rules, 47 C.F.R. §§ 0.331, 1.2104(g)(1999), Toto Communications, Inc. IS ASSESSED an initial default payment of \$3,847.50.

9. IT IS FURTHER ORDERED that, pursuant to section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, Toto Communications, Inc.'s amount on deposit, totaling \$12,825.00, will be applied to cover the default payment of \$3,847.50.

10. IT IS FURTHER ORDERED that, pursuant to sections 0.331, 1.2104(g), and 24.704, 47 C.F.R. §§ 0.331, 1.2104(g)(1999), 24.704, Toto Communications, Inc. will be subject to the balance of the payment after the market for Basic Trading Area (BTA) 490F, Guam is re-auctioned and the full default payment is determined.

FEDERAL COMMUNICATIONS COMMISSION

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

APPENDIX A:

DEFAULT CALCULATIONS ATTACHMENT

Toto Communications, Inc., Auction No. 10:

Market BTA490, Channel Block F,

Initial Default Deposit

Net Winning Bid \$ 128,250.00

Initial Default Penalty \$ 3,847.50
(3% of the net winning bid)