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

In the Matter of Winstar LMDS, LLC (Chapter 7 Debtor) Request for Waiver of 1.2111(d) and 101.1107(e) of the Commission's Rules Regarding Unjust Enrichment Payment for Fifteen LMDS Licenses Purchased in Auction No. 17 Application for Assignment of Licenses and Authorizations from Winstar LMDS, LLC (Chapter 7 Debtor) to Winstar Spectrum, LLC	)	File No. 0000721683

ORDER

Adopted: April 17, 2002 **Released: April 17, 2002**

By the Deputy Chief, Auctions and Industry Analysis Division:

I. INTRODUCTION

1. In this Order, we resolve Winstar LMDS, LLC (Chapter 7 Debtor)'s ("Winstar LMDS") request for waiver[1] of the unjust enrichment provisions in sections 1.2111(d) and 101.1107(e) of the Commission's rules[2] with respect to a pending application to assign fifteen LMDS licenses to a non-designated entity.[3] For the reasons discussed below, we deny Winstar LMDS' Waiver Request.

II. BACKGROUND

2. On March 25, 1998, the Commission concluded an auction of 986 Local Multipoint Distribution Service ("LMDS") licenses ("Auction No. 17").[4] Winstar LMDS, LLC a subsidiary of

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[1] Request for Waiver of the Unjust Enrichment Payment; Federal Communications Commission Rule Sections 1.2111(d) and 101.1107(e), filed by Christine Shubert, on behalf of Winstar LMDS, LLC (debtor-in-possession), on January 10, 2002. As discussed herein, Winstar LMDS' (debtor-in-possession) assignment application, File No. 0000721683, was subsequently amended to reflect the assignor as Winstar LMDS, LLC (Chapter 7 Debtor). Application of Winstar LMDS, LLC (debtor-in-possession) to Winstar LMDS, LLC (Chapter 7 Debtor), File No. 0000760178 (Feb. 5, 2002) (collectively referred to herein as Winstar LMDS "Waiver Request").

[2] 47 C.F.R. §§ 1.2111(d), 101.1107(e).

[3] Waiver Request at 1. This Order does not address the merits of Winstar LMDS' assignment application, File No. 0000721683 or the additional waiver requests attached to the other assignment applications, File Nos. 0000723317 (Winstar Wireless Fiber Corp.) and 0000721675 (WWI License Holding, Inc.).

[4] "LMDS Auction Closes; Winning Bidders in the Auction of 986 Local Multipoint Distributions Service (LMDS) Licenses," *Public Notice*, 13 FCC Rcd 18217 (1998) ("*Auction No. 17 Closing PN*").

Winstar Communications, Inc. ("Winstar Communications"), qualified as an entrepreneur in Auction No. 17 and utilized a twenty-five percent bidding credit.[5] Winstar LMDS, LLC was the successful high bidder on fifteen LMDS licenses.[6] Winstar LMDS, LLC's total net bid was approximately 43 million dollars for the fifteen LMDS licenses.[7]

3. In April 2001, Winstar Communications and its domestic subsidiaries, Winstar Wireless Fiber Corp., WWI License Holding, Inc., and Winstar LMDS, LLC filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code.[8] In June 2001, the Commission approved the *pro forma* transfer of Winstar Communications' subsidiaries' licenses to the debtors-in-possession.[9] On December 18, 2001, IDT corporation, through its subsidiary, IDT Winstar Acquisition, Inc. (which subsequently changed its name to Winstar Holdings, LLC ("Winstar Holdings")), submitted an offer ("Asset Purchase Agreement") to the Bankruptcy Court to acquire, for 38 million dollars plus other consideration in the form of IDT Winstar Acquisition, Inc.'s common stock,[10] the core domestic telecommunications assets of Winstar Communications, and to manage its network, subject to regulatory approvals.[11] The next day, the Bankruptcy Court approved the Asset Purchase Agreement and other related agreements, including a Management Agreement, between Winstar Communications, its subsidiaries, and Winstar Holdings, subject to Commission approval of the assignment applications.[12] Subsequently, in January 2002, the Bankruptcy Court approved the conversion of Winstar Communications' and its domestic subsidiaries' cases to a Chapter 7 bankruptcy proceeding.[13]

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[5] 47 C.F.R. § 101.1107(c).

[6] *Auction No. 17 Closing PN*, Attachment A. The fifteen markets included: (1) B079 (B) (Chico-Oroville, CA); (2) B136 (B) (Fairbanks, AK); (3) B157 (A) (Fresno, CA); (4) B174 (A) (Point, NC); (5) B208 (B) (Ithaca, NY); (6) B221 (B) (Juneau-Ketchikan, AK); (7) B303 (A) (Modesto, CA); (8) B320 (A) (New Orleans, LA); (9) B324 (A) (News-Hampton, VA); (10) B336 (A) (Orlando, FL); (11) B365 (A) (Provo-Orem, UT); (12) B389 (B) (Sacramento, CA); (13) B399 (A) (Salt Lake City-Ogden, UT); (14) B404 (A) (CA); and (15) B492 (B) (American Samoa). These licenses are respectively designated as FCC Call Signs WPOH628, WPOH635, WPOH626, WPOH629, WPOH623, WPOH636, WPOH627, WPOH631, WPOH632, WPOH630, WPOH634, WPOH625, WPOH633, WPOH624, and WPOH637.

[7] *Auction No. 17 Closing PN*, 13 FCC Rcd 18217; Waiver Request at 7.

[8] *In re Winstar Communications, Inc.*, Case No. 01-1430 (Bankr. D. Del.) (Apr. 18, 2001).

[9] These *pro forma* transfer applications are designated as File Nos. 0000463080 (Winstar Wireless Fiber Corp.), 0000463106 (WWI License Holding, Inc.), 0000463132 (Winstar LMDS, LLC), and 0000463234 (Winstar Puerto Rico, Inc.).

[10] In the alternative, the Asset Purchase Agreement provides that IDT Winstar Acquisition, Inc. could acquire Winstar Communications for approximately 30 million dollars and IDT Corporation's Class B common stock having a value equal to 12.5 million dollars plus other consideration in the form of IDT Winstar Acquisition, Inc.'s common stock. Application of Winstar LMDS, LLC, File No. 0000721683, Exhibit A at 11, Section 3.1.

[11] Waiver Request at 3. The Asset Purchase Agreement does not indicate what amount of the purchase price is associated with the 15 LMDS licenses from the value of the other licenses and assets. *Id*.

[12] *Id*.

[13] *In re Winstar Communications, Inc.,* Case No. 01-1430 (Bankr. D. Del.) (Jan. 24, 2002). The approvals converting Winstar Communications' and its domestic subsidiaries' cases from a Chapter 11 bankruptcy proceeding to a Chapter 7 bankruptcy proceeding are designated as File Nos. 0000760127 (WWI License Holding, Inc.), 0000760178 (Winstar LMDS, LLC), and 0000760156 (Winstar Wireless Fiber Corp.). Specifically, Winstar LMDS' (debtor-in-possession) assignment application, File No. 0000721683, was amended to reflect the assignor as Winstar LMDS, LLC (Chapter 7 Debtor). Application of Winstar LMDS, LLC (debtor-in-possession) to Winstar LMDS, LLC (Chapter 7 Debtor), File No. 0000760178 (Feb. 5, 2002). This Order does not address the status of these licenses.

4. Prior to finalizing the Asset Purchase Agreement, Winstar Spectrum, LLC ("Winstar Spectrum"), a subsidiary of Winstar Holdings, was formed to take assignment of the licenses held by Winstar Communications' subsidiaries.[14] Subsequently, on January 10, 2002, Winstar Communications' subsidiaries filed applications with the Commission to assign over 1,768 licenses to Winstar Spectrum.[15] The 1,768 licenses listed in the assignment applications include: (1) 615 site based Common Carrier Point-to-Point Microwave licenses; (2) 931 39 GHz Economic Area licenses; (3) 205 39 GHz Rectangular Service Area Common Carrier licenses; (4) 16 LMDS licenses;[16] and (5) 1 Digital Electronic Message Service license.[17] Winstar LMDS filed the request for waiver of the Commission's unjust enrichment payment provisions with respect to the fifteen auctioned LMDS licenses as an attachment to the assignment application.[18] In the Waiver Request, Winstar LMDS acknowledges that Winstar Spectrum, the proposed assignee, is not eligible to receive bidding credits.[19]

5. The Commission's unjust enrichment rules provide that a licensee that utilizes a bidding credit, and during the initial license term, seeks to assign or transfer a license to an entity that is ineligible to receive a bidding credit, must reimburse the Federal Government for the amount of the bidding credit plus interest from the date of license grant.[20] However, the amount of unjust enrichment will be reduced over time based on the year the assignment or transfer occurs during the license term.[21]

6. Winstar LMDS seeks a waiver of the Commission's unjust enrichment rules so it can assign fifteen LMDS licenses, which it obtained using small business bidding credits, to Winstar Spectrum without making the unjust enrichment payment.[22] In support of its request for waiver of the unjust enrichment payment, Winstar LMDS states that it is currently in bankruptcy and will not profit from the assignment of the LMDS licenses nor does it have any remaining funds to make the required unjust enrichment payment.[23] Additionally, Winstar LMDS argues that waiving the unjust enrichment payment will permit Winstar Spectrum to fully devote current funds to the operation and maintenance of the Winstar LMDS network, to build a nationwide network, and to compete against local exchange carriers.[24] Specifically, Winstar LMDS received a twenty-five percent bidding credit for each LMDS license, totaling approximately 14 million dollars for the fifteen LMDS licenses.[25] Because Winstar LMDS seeks to assign the LMDS licenses during year four of the license term for each license, under the Commission's rules, the unjust enrichment payment would be calculated by reducing the total value of the

[14] Waiver Request at 4, fn. 8.

[15] *Id*. at 4. These assignment applications are designated as File Nos. 0000721683 (Winstar LMDS, LLC), 0000723317 (Winstar Wireless Fiber Corp.), and 0000721675 (WWI License Holding, Inc.).

[16] This includes the fifteen LMDS licenses that were purchased in Auction No. 17 and one non-auctioned LMDS license.

[17] Application of Winstar LMDS, LLC (debtor-in-possession), File No. 0000721683, Attachment 2 at 1, fn. 2 (Jan. 10, 2002).

[18] *Id*. at Attachment 4.

[19] Waiver Request at 2, fn. 5.

[20] 47 C.F.R. §§ 1.2111(d)(1), 101.1109(e)(1).

[21] 47 C.F. R. §§ 1.2111(d)(2), 101.1109(e)(2).

[22] Waiver Request at 10.

[23] *Id*. at 4-5.

[24] *Id*. at 8.

[25] The bidding credit is calculated as twenty-five percent of the winning bid on each LMDS license. 47 C.F.R. § 101.1107(c). The winning bids for the fifteen LMDS licenses totaled approximately 57 million dollars. *Auction No. 17 Closing PN* , 13 FCC Rcd 18217, Attachment A.

bidding credits by fifty percent.[26] Therefore, absent a waiver, under the Commission's rules, approval of Winstar LMDS' assignment application would be conditioned on the payment of approximately 7 million dollars in unjust enrichment plus 1.5 million dollars in interest.[27]

III. DISCUSSION

7. As we explain below, Winstar LMDS does not offer any persuasive arguments to waive the unjust enrichment rules in this instance. Winstar LMDS has failed to establish that it should be permitted to retain the financial benefit granted, *i.e.* the bidding credit, where it has not retained the LMDS licenses for the minimum five-year holding period. Accordingly, the waiver request is denied.

8. In order to obtain the requested waiver, Winstar LMDS must show that either (i) the underlying purpose of the unjust enrichment rules would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rules would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.[28] Winstar LMDS, like others before it, has not presented any persuasive arguments to justify a waiver of the Commission's unjust enrichment rules.[29]

9. The underlying purposes of the Commission's unjust enrichment rules stem from our congressional mandate in Section 309(j) of the Communications Act of 1934, as amended.[30] Congress included the concept of unjust enrichment in two subsections in Section 309(j) of the Communications Act.[31] As one of the objectives of the Communications Act, Congress instructed the Commission to avoid unjust enrichment through the methods it employed to award use of the spectrum.[32] Congress also specifically directed that, in prescribing regulations pursuant to Section 309(j) of the Communications

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[26] 47 C.F.R. §§ 1.2111(d)(2)(C), 101.1107(e)(2)(iii).

[27] 47 C.F.R. §§ 1.2111(d)(1), 101.1109(e)(1). The interest was calculated from the date of license grant, August 10, 1998, to April 17, 2002. Any unjust enrichment payments are assessed in the Commission's action on the underlying assignment applications. *See* Wireless Telecommunications Bureau Conditions Grant of Assignments of Licenses from Subsidiaries of Winstar Communications, Chapter VII Debtors, to Winstar Spectrum, LLC, a Subsidiary of IDT Corporation, *Public Notice*, DA 02-895 (rel. April 17, 2002).

[28] 47 C.F.R. § 1.925.

[29] *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Memorandum Opinion and Order*, 14 FCC Rcd 20453 (1999) ("*Omnipoint Order*") (upholding a Division order denying Omnipoint's petition for waiver of the Commission's size-based bidding credit eligibility rule for C block licenses, the Commission noted that it had previously determined that the unjust enrichment provisions would apply to secondary market transactions as described by Omnipoint); *D&E Order*, 15 FCC Rcd 61 (holding that an assignee lacked standing to request waiver of the unjust enrichment rules, and that, in any event, the fact that the assignee had been eligible for bidding credit at time of original auction did not warrant waiver of these rules, given fact that assignee had since outgrown the bidding credit eligibility); Applications of TeleCorp PCS, Inc., Tritel, Inc., and Indus, Inc. and TeleCorp Holding Corp. II. L.L.C., TeleCorp PCS, L.L.C., et. al, *Memorandum Opinion and Order*, 16 FCC Rcd 3716 (2000) (WTB) ("*TeleCorp and Tritel Order*") (denying waiver of the unjust enrichment rules and holding that for purposes of determining bidding credit eligibility the Commission evaluates an entity's status at the time an assignment or transfer application is filed and does not look to prior eligibility determinations).

[30] 47 U.S.C. § 309(j)(3)(C),(4)(E).

[31] 47 U.S.C. § 309(j)(3)(C),(4)(E).

[32] 47 U.S.C. § 309(j)(3)(C) (". . . [the Commission] shall seek to promote . . . the following objectives: . . . recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource . . .").

Act, the Commission shall "require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses."[33] Pursuant to this mandate, when the Commission adopted small business bidding preferences to facilitate the participation of designated entities[34] in auctions, the Commission also adopted unjust enrichment provisions.[35] The purpose of such provisions is "to prevent designated entities from profiting by the rapid sale of licenses acquired through the benefit of preference policies."[36] Accordingly, the unjust enrichment rule requires designated entities, during the first five years of the initial license term, seeking approval of a transfer of control or assignment of a license to a non-designated entity or an entity that qualifies for a different level of bidding credit, to reimburse the government for the amount of the bidding credit or for the difference between the bidding credit obtained by the seller and the bidding credit for which the buyer would qualify, plus interest.[37]

10. Winstar LMDS argues that the underlying purpose of the regulations would not be served by requiring an unjust enrichment payment in this instance.[38] Winstar LMDS states that it will not profit from the assignment of the LMDS licenses, because any proceeds from the assignment of the licenses will be given to Winstar LMDS' creditors in the bankruptcy proceeding.[39] Further, Winstar LMDS contends that if it could retain the proceeds from the assignment of the LMDS licenses, it still would not make a "profit," as the term is commonly used, because it would sell at a loss.[40] Finally, Winstar LMDS asserts that waiving the unjust enrichment payment will serve the public interest because it will allow Winstar Spectrum to fully devote current funds to build a nationwide network and compete against local exchange carriers.[41]

11. Winstar LMDS' arguments lack merit. Winstar LMDS has not outlined a situation where adherence to the Commission's rules would undermine their underlying purpose or where deviating from the rules would be in the public interest. As noted above, Congress has specifically directed the Commission to take measures to prevent unjust enrichment as a result of the methods employed to issue

[33] 47 U.S.C. § 309(j)(4)(E).

[34] The Commission's rules define designated entities as "small businesses, businesses owned by women or members of minority groups, and rural telephone companies." 47 C.F.R. § 1.2110(a); *see* 47 U.S.C. §§ 309(j)(4)(C)-(D). However, the term is generally used in a more limited context to refer to those entities, which satisfy certain size standards and thereby qualify for certain benefits.

[35] 47 C.F.R. §§ 1.2111(d), 101.1107(e).

[36] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2394, ¶ 258 (1994) ("*Competitive Bidding Second Report and Order*").

[37] 47 C.F.R. § 1.2111; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2395, ¶ 264.

[38] Waiver Request at 5.

[39] *Id*. at 6-7.

[40] *Id*.

[41] *Id*. at 8. Winstar LMDS also requests, at a minimum, that the Commission waive its unjust enrichment payment for 6 LMDS licenses (designated as FCC Call Signs WPOH626, WPOH627, WPOH629, WPOH630, WPOH631 and WPOH637) since all bidders on these 6 LMDS licenses used a twenty-five percent bidding credit. *Id*. at 7, fn. 17. Thus, Winstar LMDS argues that the use of bidding credits does not affect the outcome of these 6 LMDS licenses. *Id*. We disagree. Unlike licensees that participated in C block Auction Nos. 5 and 10, where virtually *all* bidders in these auctions (not just on particular licenses) and license winners qualified for a single twenty-five percent bidding credit, Auction No. 17 included many other bidders and license winners not eligible for bidding credits. *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16266, 16290-91, ¶ 51 (2000) ("*C Block Sixth Report and Order*"). Thus, the rationale articulated in the *C Block Sixth Report and Order* is not applicable in the instant matter.

licenses.[42] Pursuant to this statutory obligation, the Commission's unjust enrichment rules provide that where a designated entity seeks to assign or transfer a license during the first five years of the initial license term, approval of the assignment or transfer application will be conditioned upon full repayment of the bidding credit. Thus, through this mechanism, the Commission prevents unjust enrichment.[43]

12. In calculating an unjust enrichment payment, the Commission does not take into consideration the amount of profit or loss a licensee incurs when selling its assets. Rather, the Commission looks towards the benefit initially received by the licensee at the time the spectrum was auctioned. As we observed in the *D&E Communications* case, the Commission has stated that the purposes of these rules are "[t]o ensure that bidding credits benefit the parties to whom they are directed" and "to help promote the long-term holding of licenses by those parties receiving bidding credits."[44] The approach adopted by the Commission reflects the determination that the licensee should not retain the financial benefit of the bidding credit if the license is not going to remain in the hands of an entity eligible for that credit for at least five years. Moreover, to look at each transaction using a profit/loss analysis, as Winstar LMDS' request suggests, would inject lengthy delays into the process governing assignment and transfer of licenses. Furthermore, to substitute subjective business judgments regarding issues of profit or loss as the measure to determine unjust enrichment is to replace the objective standards established by the Commission in accordance with the Communications Act. The Commission cannot administer its programs, and in particular the designated entity program, in such a way.

13. Winstar LMDS, at the time of Auction No. 17, received a fixed benefit, *i.e.,* bidding credit, from the Government for fifteen LMDS licenses. If the unjust enrichment payment is waived, Winstar LMDS will receive the benefit of the bidding credit despite its failure to either hold on to the license for the required holding period or ensure that the LMDS licenses are sold to a designated entity. Such a situation undermines the purpose of the unjust enrichment rules envisioned by the Commission.[45] In this instance, a denial of Winstar LMDS' request does not prohibit the transfer of the LMDS licenses to Winstar Spectrum or any other entity. Rather, denial ensures that "bidding credits benefit the parties to whom they are directed."[46] We also reject, as contrary to the underlying purpose of the Commission's bidding credit rules, Winstar LMDS' argument that it would be appropriate to grant the waiver request because grant would allow Winstar Spectrum to fully devote current funds to its other business initiatives.[47]

14. Nor are we persuaded that the purported benefit to Winstar LMDS' creditors in the bankruptcy is a sufficient public interest basis to grant a waiver here.[48] The Commission's rules regarding

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[42] 47 U.S.C. § 309(j)(4)(E).

[43] 47 C.F.R. § 1.2111(d)(1). Section 1.2111(d)(1) states that "[a] licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria . . . will be required to reimburse the Government for the amount of the bidding credit, plus interest . . . as a *condition* of Commission approval of the assignment or transfer." (emphasis added); *see* 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*, 15 FCC Rcd 15293, 15314, ¶ 37 (2000) ("*Part 1 Fifth Report and Order*"); *see also D&E Order*, 15 FCC Rcd 61.

[44] *D&E Order*, 15 FCC Rcd at 65 (quoting Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532, 5539, ¶ 15 (1994) ("*Competitive Bidding Fifth Report and Order*")).

[45] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394, ¶ 258.

[46] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5591, ¶ 134.

[47] *Id*.

[48] *See LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974).

unjust enrichment were known to the parties at the time of the transaction, and there was no precedent for the parties to assume that a waiver would be forthcoming. Likewise, the creditors of Winstar LMDS knew or should have known that the LMDS licenses held by Winstar LMDS were acquired using bidding credits and that assignment of the licenses before five years could result in recovery of an unjust enrichment payment. Accordingly, we assume that Winstar Spectrum and Winstar LMDS took into account the potential unjust enrichment recovery in reaching the value of the assets paid to the estate. A waiver of the unjust enrichment rules could result in a double recovery to the estate and creditors - - Winstar LMDS and its creditors obtained the benefit of the bidding credit while Winstar LMDS held the licenses, and will receive the benefits of the assignment of the licenses to Winstar Spectrum upon the consummation of the transaction, which presumably took into account the possibility that a waiver would not be granted.[49] In these circumstances, we do not believe that the unjust enrichment rules should be compromised. As noted above, the waiver denial will not impede the transaction with Winstar Spectrum, which will bring value to the estate. In view of the explicit Congressional mandate in the Communications Act regarding the imposition of unjust enrichment payments, we conclude that the parties have not shown that the public interest, including consideration of the general policies of the Bankruptcy Code, will be served by granting the requested waiver.

15. We also find to be unpersuasive Winstar LMDS' argument that the application of the rules in this instance is unduly burdensome. In the *Part 1 Order*, the Commission considered and rejected the position advocated by Winstar LMDS in this instance, that a licensee's financial inability to make an unjust enrichment payment makes the application of the rules unduly burdensome.[50] The Commission stated that "in most situations of financial distress, licenses can be transferred as a "going concern" subject, of course, to the rights of the Commission to the payments of obligations created under the Commission's rules (including unjust enrichment payments), the license conditions, the promissory note, and the security agreement."[51] Following this precedent, we denied a request to waive the unjust enrichment provisions for an entity that had, at the time of an application for transfer of a license, outgrown the bidding credit eligibility it held at the time of Auction No. 5.[52] In denying the request, we noted that the Commission previously indicated in the *Part 1 Order* that even when the financial distress of a licensee is so severe that the Commission chooses to allow a designated entity to transfer a license to a non-designated entity, the Commission will require payment of unjust enrichment.[53] In sum, the applicable precedent makes it clear that financial distress is not a basis upon which to grant a waiver of the unjust enrichment rules and does not present unique or unusual circumstances sufficient to justify a waiver of the bidding credit unjust enrichment rules.

[49] Similarly, Winstar Spectrum has not shown, beyond its *ipse dixit*, that retaining the bidding credit will actually increase its ability to compete in the relevant markets.

[50] Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd 5686, 5695-96, ¶ 13 (1997) ("*Part 1 Order*"); *D&E Order*, 15 FCC Rcd 61 (1999) (A&IAD).

[51] *Id*. at 5696, ¶ 13.

[52] *D&E Order*, 15 FCC Rcd 61 (1999) (A&IAD). We note that in this case, the entity requesting the waiver was the parent of one of the constituent parties of the buyer (not the licensee-seller). We not only denied the entity's waiver request on the ground stated above (*i.e.*, that the entity did not, at the time of the proposed transfer, qualify as eligible for bidding credits), but also because the entity lacked standing (since repayment of the bidding credit is an obligation of the licensee/assignor).

[53] *Id*. at 68, ¶ 15; (citing *see Part 1 Order*, 12 FCC Rcd at 5695-96, ¶ 13); *see also TeleCorp and Tritel Order*, 16 FCC Rcd 3716.

IV. ORDERING CLAUSE

16. Accordingly, IT IS ORDERED that, pursuant to 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), and Section 0.331 of the Commission's rules, Winstar LMDS' request for waiver of sections 1.2111(d) and 101.1107(e) of the Commission's rules IS DENIED.

Federal Communications Commission

Kelly Quinn
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