

Federal Communications Commission

§ 1.935

(B) It is an application for which the applicant submitted the winning bid in a competitive bidding process.

(2) If an applicant who is a winning bidder for a license in a competitive bidding process requests dismissal of its short-form or long-form application, the Commission will dismiss that application with prejudice. The applicant will also be subject to default payments under Subpart Q of this part.

(3) An applicant who requests dismissal of its application after that application has been designated for comparative hearing may submit a written petition requesting that the dismissal be without prejudice. Such petition must demonstrate good cause and be served upon all parties of record. The Commission may grant such petition and dismiss the application without prejudice or deny the petition and dismiss the application with prejudice.

(b) *Dismissal of mutually exclusive applications not granted.* The Commission may dismiss mutually exclusive applications:

(1) For which the applicant did not submit the winning bid in a competitive bidding process; or

(2) That receive comparative consideration in a hearing but are not granted by order of the presiding officer.

(c) *Dismissal for failure to prosecute.* The Commission may dismiss applications for failure of the applicant to prosecute or for failure of the applicant to respond substantially within a specified time period to official correspondence or requests for additional information. Such dismissal will generally be without prejudice if the failure to prosecute or respond occurred prior to designation of the application for comparative hearing, but may be with prejudice in cases of non-compliance with § 1.945 of this part. Dismissal will generally be with prejudice if the failure to prosecute or respond occurred after designation of the application for comparative hearing. The Commission may dismiss applications with prejudice for failure of the applicant to comply with requirements related to a competitive bidding process.

(d) *Dismissal as defective.* The Commission may dismiss without prejudice an application that it finds to be defective. An application is defective if:

(1) It is unsigned or incomplete with respect to required answers to questions, informational showings, or other matters of a formal character;

(2) It requests an authorization that would not comply with one or more of the Commission's rules and does not contain a request for waiver of these rule(s), or in the event the Commission denies such a waiver request, does not contain an alternative proposal that fully complies with the rules;

(3) The appropriate filing fee has not been paid; or

(4) The FCC Registration Number (FRN) has not been provided.

(5) It requests a vanity call sign and the applicant has pending another vanity call sign application with the same receipt date.

(e) *Dismissal because spectrum not available.* The Commission may dismiss applications that request spectrum which is unavailable because:

(1) It is not allocated for assignment in the specific service requested;

(2) It was previously assigned to another licensee on an exclusive basis or cannot be assigned to the applicant without causing harmful interference; or

(3) Reasonable efforts have been made to coordinate the proposed facility with foreign administrations under applicable international agreements, and an unfavorable response (harmful interference anticipated) has been received.

(f) *Dismissal as untimely.* The Commission may dismiss without prejudice applications that are premature or late filed, including applications filed prior to the opening date or after the closing date of a filing window, or after the cut-off date for a mutually exclusive application filing group.

[63 FR 68930, Dec. 14, 1998, as amended at 66 FR 47895, Sept. 14, 2001; 71 FR 66461, Nov. 15, 2006]

§ 1.935 Agreements to dismiss applications, amendments or pleadings.

Parties that have filed applications that are mutually exclusive with one or more other applications, and then enter into an agreement to resolve the mutual exclusivity by withdrawing or

requesting dismissal of the application(s), specific frequencies on the application or an amendment thereto, must obtain the approval of the Commission. Parties that have filed or threatened to file a petition to deny, informal objection or other pleading against an application and then seek to withdraw or request dismissal of, or refrain from filing, the petition, either unilaterally or in exchange for a financial consideration, must obtain the approval of the Commission.

(a) The party withdrawing or requesting dismissal of its application (or specific frequencies on the application), petition to deny, informal objection or other pleading or refraining from filing a pleading must submit to the Commission a request for approval of the withdrawal or dismissal, a copy of any written agreement related to the withdrawal or dismissal, and an affidavit setting forth:

(1) A certification that neither the party nor its principals has received or will receive any money or other consideration in excess of the legitimate and prudent expenses incurred in preparing and prosecuting the application, petition to deny, informal objection or other pleading in exchange for the withdrawal or dismissal of the application, petition to deny, informal objection or other pleading, or threat to file a pleading, except that this provision does not apply to dismissal or withdrawal of applications pursuant to bona fide merger agreements;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the withdrawal or dismissal of the application, petition to deny, informal objection or other pleading, or threat to file a pleading.

(b) In addition, within 5 days of the filing date of the applicant's or petitioner's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has paid or will pay money or other consideration

in excess of the legitimate and prudent expenses of the petitioner in exchange for withdrawing or dismissing the application, petition to deny, informal objection or other pleading; and

(2) The terms of any oral agreement relating to the withdrawal or dismissal of the application, petition to deny, informal objection or other pleading.

(c) No person shall make or receive any payments in exchange for withdrawing a threat to file or refraining from filing a petition to deny, informal objection, or any other pleading against an application. For the purposes of this section, reimbursement by an applicant of the legitimate and prudent expenses of a potential petitioner or objector, incurred reasonably and directly in preparing to file a petition to deny, will not be considered to be payment for refraining from filing a petition to deny or an informal objection. Payments made directly to a potential petitioner or objector, or a person related to a potential petitioner or objector, to implement non-financial promises are prohibited unless specifically approved by the Commission.

(d) For the purposes of this section:

(1) Affidavits filed pursuant to this section must be executed by the filing party, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) Each application, petition to deny, informal objection or other pleading is deemed to be pending before the Commission from the time the petition to deny is filed with the Commission until such time as an order or correspondence of the Commission granting, denying or dismissing it is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by a party in preparing to file, filing, prosecuting and/or settling its application, petition to deny, informal objection or other pleading for which reimbursement is sought.

(4) "Other consideration" consists of financial concessions, including, but not limited to, the transfer of assets or the provision of tangible pecuniary

benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

(e) Notwithstanding the provisions of this section, any payments made or received in exchange for withdrawing a short-form application for a Commission authorization awarded through competitive bidding shall be subject to the restrictions set forth in § 1.2105(c) of this chapter.

[63 FR 68931, Dec. 14, 1998]

§ 1.937 Repetitious or conflicting applications.

(a) Where the Commission has, for any reason, dismissed with prejudice or denied any license application in the Wireless Radio Services, or revoked any such license, the Commission will not consider a like or new application involving service of the same kind to substantially the same area by substantially the same applicant, its successor or assignee, or on behalf of or for the benefit of the original parties in interest, until after the lapse of 12 months from the effective date of final Commission action.

(b) [Reserved]

(c) If an appeal has been taken from the action of the Commission dismissing with prejudice or denying any application in the Wireless Radio Services, or if the application is subsequently designated for hearing, a like application for service of the same type to the same area, in whole or in part, filed by that applicant or by its successor or assignee, or on behalf of or for the benefit of the parties in interest to the original application, will not be considered until the final disposition of such appeal.

(d) While an application is pending, any subsequent inconsistent or conflicting application submitted by, on behalf of, or for the benefit of the same applicant, its successor or assignee will not be accepted for filing.

[63 FR 68931, Dec. 14, 1998, as amended at 68 FR 25842, May 14, 2003]

§ 1.939 Petitions to deny.

(a) *Who may file.* Any party in interest may file with the Commission a petition to deny any application listed in a Public Notice as accepted for filing,

whether as filed originally or upon major amendment as defined in § 1.929 of this part.

(1) For auctionable license applications, petitions to deny and related pleadings are governed by the procedures set forth in § 1.2108 of this part.

(2) Petitions to deny for non-auctionable applications that are subject to petitions under § 309(d) of the Communications Act must comply with the provisions of this section and must be filed no later than 30 days after the date of the Public Notice listing the application or major amendment to the application as accepted for filing.

(b) *Filing of petitions.* Petitions to deny and related pleadings may be filed electronically via ULS. Manually filed petitions to deny must be filed with the Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. Attachments to manually filed applications may be filed on a standard 3¼" magnetic diskette formatted to be readable by high density floppy drives operating under MS-DOS (version 3.X or later compatible versions). Each diskette submitted must contain an ASCII text file listing each filename and a brief description of the contents of each file on the diskette. The files on the diskette, other than the table of contents, should be in Adobe Acrobat Portable Document Format (PDF) whenever possible. Petitions to deny and related pleadings must reference the file number of the pending application that is the subject of the petition.

(c) *Service.* A petitioner shall serve a copy of its petition to deny on the applicant and on all other interested parties pursuant to § 1.47. Oppositions and replies shall be served on the petitioner and all other interested parties.

(d) *Content.* A petition to deny must contain specific allegations of fact sufficient to make a *prima facie* showing that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof.