

DA 99-1903  
September 17, 1999

Mr. Cary S. Tepper  
Booth, Freret, Imlay & Tepper, P.C.  
5101 Wisconsin Avenue, N.W.  
Washington, D.C. 20016-4120

Mr. Larry D. Jones  
6001 Wilkinson Road  
Richmond, VA 23227

Dear Mr. Tepper and Mr. Jones:

This letter responds to your requests for waiver, dated September 14, 1999, in which you request that the Auctions and Industry Analysis Division waive the September 13, 1999, deadline for upfront payments in the closed broadcast auction (Auction No. 25).<sup>1</sup> Specifically, you contend that you were not able to submit the required FCC Form 159 on time on account of mechanical difficulties with the fax machine at the Mellon Bank.

The Commission's rules require that in order to receive a waiver of a rule, an applicant must demonstrate either that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest.<sup>2</sup> For the reasons cited below, we find that the circumstances you describe in support of your waiver requests meet the Commission's criteria for obtaining a waiver.

Section 73.5003 of the Commission's rules requires that in order to be eligible to bid, each bidder in every broadcast service auction shall submit an upfront payment by wire transfer prior to the commencement of bidding, accompanied by an FCC Form 159, as set forth in any public notices and in accordance with 47 C.F.R. § 1.2106.<sup>3</sup> The

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<sup>1</sup> See "Closed Broadcast Auction; Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 23, 1999; Minimum Opening Bids and Other Procedural Issues," *Public Notice*, DA 99-1346 (rel. July 9, 1999) ("*Broadcast Auction Public Notice*").

<sup>2</sup> 47 C.F.R. § 1.925. See, e.g., *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

<sup>3</sup> See 47 C.F.R. § 73.5003 (1998).

Commission established the September 13, 1999 upfront payment deadline in the *Broadcast Auction Public Notice*, released July 9, 1999.<sup>4</sup> Commission procedures require an applicant to fax a completed FCC Form 159 to Mellon Bank at least one hour before placing the order for a wire transfer.<sup>5</sup> In your requests for waiver, you state that you attempted to fax the FCC Form 159 to Mellon Bank but could not do so on account of a mechanical failure in Mellon's fax machine that prevented them from receiving your transmission. You tried to notify the Commission of this problem by leaving a message with the designated contact person, but were unable to do so because that person's mailbox was full and not able to record additional messages.

We believe that you have presented sufficient facts to meet the standard for a waiver of the Commission's upfront payment deadline. There is no indication in the record that your actions were part of a deliberate effort to delay payment. To the contrary, we acknowledge that there were mechanical problems with the fax machine at the Mellon Bank. Your actions demonstrate that, but for these unique circumstances, you would have been able to meet the upfront payment deadline in a timely manner. Granting your waiver requests is appropriate in this instance because there is no question regarding your ability to meet your financial obligations. We note that you submitted your minimum upfront payments at the first available opportunity. Moreover, we find that no other applicant would be unduly prejudiced by acceptance of your late upfront payments, and strict application of the Commission's deadline in this case would eliminate qualified bidders from the auction process. We nevertheless caution auction participants regarding the importance of planning ahead to account for last-minute mechanical and other unforeseen technical difficulties.

This action is taken under delegated authority pursuant to Section 0.331 of the Commission's rules.<sup>6</sup>

Sincerely,

Amy Zoslov  
Chief, Auctions & Industry Analysis Division  
Wireless Telecommunications Bureau

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<sup>4</sup> See *Broadcast Auction Public Notice*.

<sup>5</sup> *Id.* at 14-15.

<sup>6</sup> 47 C.F.R. § 0.331.