



FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

DA 00-817  
April 11, 2000

Mr. Thomas Gutierrez  
Mr. Todd Slamowitz  
Lukas Nace Gutierrez & Sachs  
111 Nineteenth Street, N.W. Suite 1200  
Washington, DC 20036

Dear Messrs. Gutierrez and Slamowitz:

This letter responds to the Letter that you filed on April 5, 2000 on behalf of your client, Bell Mountain Communications, Inc. ("Applicant").<sup>1</sup> Applicant requests that we waive the upfront payment deadline of March 27, 2000, 6:00 p.m. (EST) for Auction No. 30 due to an administrative error by Riggs & Company Bank (Riggs) that resulted in a failure to wire transfer funds from Applicant to the Commission's account at Mellon Bank.

To obtain a waiver of the Commission's competitive bidding rules,<sup>2</sup> Applicant must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.<sup>3</sup>

On January 21, 2000, the Commission first notified applicants for Auction No. 35 that the deadline for submission of upfront payments was 6:00 p.m. (EST) on March 27, 2000.<sup>4</sup> The Commission also warned applicants that [f]ailure to deliver the upfront payment by the March 27, 2000 deadline will result in dismissal of the application and disqualification from participation in the auction.<sup>5</sup> For the reasons cited below, we find that the circumstances of your waiver request fail to meet the Commission's standard for granting a waiver.

Applicant contends that its failure to timely submit its upfront payment was the direct result of an

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<sup>1</sup> See Letter to Margaret Wiener, Chief, Legal Branch, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Messrs. Thomas Gutierrez and Todd Slamowitz, Counsel for Bell Mountain Communications, Inc., Re: Waiver of Upfront Payment Deadline (April 5, 2000) ("

<sup>2</sup> 47 C.F.R. § 1.2105(b)(2).

<sup>3</sup> 47 C.F.R. § 1.925.

<sup>4</sup> See "Auction of Licenses for Fixed Point-to-Point Microwave Service in the 38.6 to 40.0 GHz (39 GHz) Band; Auction Notice and Filing Requirements for 2,450 Licenses in the 39 GHz Band Scheduled for April 12, 2000: Minimum Opening Bids and Other Procedural Issues," *Public Notice*, DA 00-112 (rel. January 21, 2000) ("Auction No. 30 Public Notice").

<sup>5</sup> See *Auction No. 30 Public Notice* at Section III.D.

administrative error on the part of Riggs in the processing of its wire transfer request. Specifically, on March 27, 2000, Applicant, having sufficient funds in its bank account to satisfy the upfront payment, authorized Riggs to transfer funds from the personal account of its president to the Commission's account at Mellon Bank. Applicant contends that Riggs inadvertently failed to process the wire transfer. Applicant cites as support a letter from Riggs apologizing for the recent error, on our part, in not processing a wire transfer request for \$118,000 to the [Commission].<sup>6</sup>

Applicant cites as further support cases that support a grant of a waiver of the Commission's upfront payment deadline. In particular, Applicant argues that the facts associated with Auction No. 25 applicant Ramona Lee Hayes-Bell (Hayes-Bell), in which the Wireless Telecommunications Bureau (Bureau) ultimately reinstated Hayes-Bell's application after she attributed her delay in paying the upfront payment to an error by the Nevada State Bank, are no different from the facts here. Applicant argues that, similar to Hayes-Bell, the Bureau should reinstate its application to allow Applicant to participate in Auction No. 35.

On the basis of the record before us, we are not persuaded that Applicant has demonstrated circumstances sufficient to justify the grant of a waiver in this case. We believe that Applicant had sufficient time to submit its upfront payment prior to the payment deadline. By your own admission, Applicant initiated processing of the wire payment the day of the payment deadline, leaving little time for Applicant to become familiar with the requirements of the process. The Commission has repeatedly cautioned auction participants regarding the importance of planning ahead to account for unforeseen last-minute difficulties. In particular, applicants were warned to avoid untimely payments by discuss[ing] arrangements (including bank closing schedules) with their banker several days before they plan to make a wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline.<sup>7</sup> In addition, based on documents submitted, Applicant made a critical error by not including the ABA routing number in its facsimile wire instructions to Riggs. Wire transfers to Mellon Bank cannot be successfully completed without ABA routing numbers. Furthermore, applicants were cautioned to confirm receipt of their upfront payments at Mellon Bank by contacting their sending financial institution.<sup>8</sup> Applicant did not confirm receipt of the intended transfer. In fact, Applicant did not learn of the wire transfer problem until the Bureau informed counsel for Applicant that payment was not made. Applicant did not provide itself with adequate time to successfully complete the transfer and it did not perform enough due diligence to overcome its error.

The *Riggs Letter* further indicates that a successful wire transfer may reasonably require longer than

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<sup>6</sup> Letter to Mr. Kent Foster from Sandra J. Haller, Managing Director, Riggs & Company, dated April 4, 2000 ("*Riggs Letter*"), appended as an attachment to Request. In the *Riggs Letter*, Riggs explains to the president of Applicant: "We immediately faxed your wire instructions to our DC Operations Center. However, they either never received the instructions or they were inadvertently [sic] mixed in with other faxes. Unfortunately, with a busy operations area, this can happen on occasion."

<sup>7</sup> *Auction No. 30 Public Notice* at Section III.D.1.

<sup>8</sup> *Id.*

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one full day.<sup>9</sup> Moreover, the *Riggs Letter* does not state that a mistake was made in executing the Applicant's specific wire instructions. Therefore, this situation differs from the facts associated with Auction No. 25 applicant Hayes-Bell. Accordingly, we are not convinced that grant of a waiver is warranted or would be in the public interest.

This action is taken under the delegated authority pursuant to Section 0.331 of the Commission's rules.<sup>10</sup>

Sincerely,

Mark Bollinger  
Acting Chief, Auctions and Industry Analysis  
Wireless Telecommunications Bureau

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<sup>9</sup> See *Riggs Letter*.

<sup>10</sup> 47 C.F.R. § 0.331.