



Federal Communications Commission
Washington, D.C. 20554

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DA 02-2085

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Dear Ms. Lesse and Mr. Kuykendall:

This letter responds to the Emergency Request for Waiver that you filed on June 17, 2002, on behalf of your client, Coleman County Telecommunications, Ltd. ("Coleman")¹ and the Supplement to that request filed on June 28, 2002.² Coleman requests that we waive the upfront payment deadline for Auction No. 44 due to the failure of its investment broker to timely transfer funds from Coleman's account to the Commission's account. For the reasons set forth below, we deny Coleman's request.

To obtain a waiver of the Commission's competitive bidding rules,³ Coleman 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.⁴

On March 20, 2002, the Commission first notified applicants for Auction No. 44 that deadline date for the submission of upfront payments was 6:00 p.m. ET on May 28, 2002.⁵ The Commission warned applicants that "[f]ailure to deliver the upfront payment by the May 28, 2002, deadline will result in dismissal of the application and disqualification from participation in the auction."⁶ The Commission subsequently extended the due date for upfront payments from 6:00 p.m. ET on May 28, 2002 to 6:00

¹ See Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Ms. Sylvia Lesse and Mr. John Kuykendall, Counsel for Coleman County Telecommunications, Ltd., Auction No. 44-Emergency Request for Waiver Expedited Action Requested (June 17, 2002) ("Waiver Request").

² See Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Ms. Sylvia Lesse and Mr. John Kuykendall, Counsel for Coleman County Telecommunications, Ltd., Auction No. 44 Supplement to Emergency Request for Waiver (June 28, 2002) ("Supplement to Waiver Request").

³ 47 C.F.R. § 1.2106 (c).

⁴ 47 C.F.R. § 1.925.

⁵ See Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payment and Other Auction Procedures, *Public Notice*, DA 02-563, at 23 (rel. March 20, 2002) ("*Auction No. 44 Procedures Public Notice*").

⁶ See *Auction No. 44 Procedures Public Notice* at 23.

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p.m. ET on May 30, 2002, and reminded applicants that to avoid untimely upfront payments they should discuss arrangements with their banker several days before making the wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline.⁷

Coleman contends that it missed the upfront payment deadline because its investment broker failed to timely transfer Coleman's funds to the Commission's account at Mellon Bank. Coleman claims that it provided accurate wire transfer information to its broker on the day prior to the upfront payment deadline, and at 12:30 p.m. on May 30, 2002, the day of the deadline, it authorized its broker to transfer the funds.⁸ However, the broker did not transfer Coleman's funds to the FCC's lockbox until May 31, 2002, one day after the deadline.⁹ Coleman contends that it did not know it had missed the upfront payment deadline until it discovered that it was listed as a non-qualified bidder in the *Auction No. 44 Qualified Bidders Public Notice* released on June 7, 2002. Ten days later, and just two days prior to the scheduled start of Auction No. 44, Coleman filed its waiver request.¹⁰

Coleman argues that it should be granted a waiver of the upfront payment deadline because it exercised due diligence in arranging for the wire transfer of its funds; that it missed the upfront payment solely because its broker failed to timely transfer the funds; that it had sufficient funds available to cover the upfront payment; and that it is a small business that is wholly owned by a rural telephone cooperative that provides telecommunications services to rural communities.¹¹ Coleman further argues that the facts in its case are similar to those associated with Auction No. 25 applicant Ramona Lee Hayes-Bell.¹² In *Hayes-Bell*, the Wireless Telecommunications Bureau ("Bureau") reinstated the application of Hayes-Bell after she attributed her delay in meeting the upfront payment deadline to an error by her bank. For reasons cited below, we find that the circumstances of Coleman's waiver request fail to meet the Commission's standard for granting a waiver.

On the basis of the record before us, we are not persuaded that Coleman has demonstrated circumstances warranting a waiver of the upfront payment deadline. We believe that Coleman had sufficient time to submit its upfront payment prior to the deadline. By its own admission, Coleman provided wire transfer information to its broker only one day prior to the payment deadline, and did not authorize the broker to make the transfer until 12:30 p.m. on the very day of the deadline. 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

⁷ See Auction of Licenses for 698-746 MHz Band Status of FCC Form 175 Application to Participate in the Auction Extension of Upfront Payment Deadline, *Public Notice*, DA 02-1213 at 2, (rel. May 24, 2002) ("*Auction No. 44 Status Public Notice*").

⁸ Waiver Request at 3.

⁹ Waiver Request at 3. The investment broker explained that it had received two wire transfer requests from Coleman, but disbursed funds for only one request. See Waiver Request at 2, n. 6.

¹⁰ Auction of Licenses for 698-746 MHz Band, *Public Notice*, DA 02-1346, (rel. June 7, 2002) ("*Auction No. 44 Qualified Bidders Public Notice*").

¹¹ Waiver Request at 3.

¹² In the Matter of Application of Ramona Lee Hayes-Bell for A New FM Construction Permit on Channel 236A at Pahump, Nevada, *Memorandum Opinion and Order*, 15 FCC Rcd 14729 (2000) ("*Hayes-Bell*").

completed before the deadline.”¹³ Notably, Coleman does not contend that it made any effort to confirm receipt of its upfront payment at Mellon Bank, though applicants were cautioned to “confirm receipt of their upfront payment at Mellon Bank by contacting their sending financial institution.”¹⁴ Coleman admits that it did not learn of the late wire transfer until after the Bureau released its list of qualified bidders for Auction No. 44.¹⁵ Even after learning of the wire transfer problem, Coleman did not request a waiver of the payment deadline until ten days later, which was just two days prior to the scheduled start of the auction. Thus, Coleman did not provide itself with adequate time to successfully complete the wire transfer and it did not perform enough due diligence to overcome its error.¹⁶

Because Coleman failed to perform sufficient due diligence to avoid or overcome errors made in the wire transfer process, its reliance on the Bureau’s decision in *Hayes-Bell* is misplaced. In *Hayes-Bell*, the applicant presented *correct and complete* wire transfer instructions to her bank *four* days before the upfront payment deadline. In contrast, Coleman provided wire instructions to its broker on the day before the upfront payment deadline, and even then, Coleman did not provide the authorization needed for its broker to complete the transaction until mid-day on the day of the deadline. In this regard, Coleman’s case is similar to the *Bell Mountain* decision, in which the Bureau denied the applicant a waiver of the upfront payment deadline.¹⁷ Like *Bell Mountain*, Coleman could have avoided missing the deadline if it had allowed more time for the wire transfer process to be completed.¹⁸ Coleman is also distinguishable from *Hayes-Bell* because *Hayes-Bell* involved her bank omitting the Commission’s account number, an error that would not have allowed for a timely submission of her upfront payment, no matter how many days in advance the payment was processed.¹⁹ In contrast, the failure of Coleman’s broker to timely transfer Coleman’s funds could easily have been cured if Coleman had allowed more time for processing its upfront payment. The broker’s failure does not relieve Coleman of its responsibility to exercise reasonable diligence in the wire transfer process. Accordingly, we are not convinced that grant of a waiver is warranted or would be in the public interest.²⁰

We disagree with Coleman’s contention that we should grant its request for waiver of the upfront

¹³ *Auction No. 44 Status Public Notice* at 2.

¹⁴ *Auction No. 44 Procedures Public Notice* at 24.

¹⁵ *Auction No. 44 Qualified Bidders Public Notice*, at Attachment C.

¹⁶ See Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Lynn R. Charytan, Wilmer Cutler & Pickering, Counsel for MPCS Wireless, Inc, 15 FCC Rcd 24540, 24542 (2000).

¹⁷ See Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Messrs. Thomas Gutierrez and Todd Slamowitz, Lukas Nace Gutierrez & Sachs, Counsel for Bell Mountain Communications, Inc. 15 FCC Rcd. 6217 (2000), *aff’d.*, In the Matter of Bell Mountain Communications, Inc. Request For Waiver of Upfront Payment Deadline In Auction No. 30, *Memorandum Opinion and Order*, 16 FCC Rcd. 4893 (2001), *aff’d.*, In the Matter of Bell Mountain Communications, Inc. Request For Waiver of Upfront Payment Deadline In Auction No. 30, *Memorandum Opinion and Order*, 17 FCC Rcd. 7914 (2002).

¹⁸ *Bell Mountain*, 15 FCC Rcd 6217, 6218.

¹⁹ *Hayes-Bell*, 15 FCC Rcd 14729, 14732-33.

²⁰ See *Bell Mountain*, 16 FCC Rcd 4893, 4897-98.

payment deadline because it is owned by a rural telephone cooperative that provides telecommunications services to rural communities.²¹ To support its argument, Coleman cites Sections 309(j)(3)(B) and 309(j)(4)(D) of the Communications Act, as amended.²² Section 309(j)(3)(B) directs the Commission to disseminate spectrum licenses among a wide variety of applicants, including rural telephone companies. Section 309(j)(4)(D) requires the Commission to ensure that rural telephone companies are given an opportunity to participate in the provision of spectrum-based services. Neither of these statutory provisions requires the Commission to act to ensure that particular licenses are actually disseminated to rural telephone companies.²³ Accordingly, we do not agree with Coleman that the objectives set forth in Section 309(j) regarding rural telephone companies warrant a waiver of the upfront payment deadline. We decline to hold that the fact that an applicant is owned by a rural telephone company is, by itself, sufficient justification for waiver of a payment deadline. Such a decision would lead to inconsistent application of our rules. The Commission's rules are best served by applying deadlines in a fair and consistent manner.

Finally, Coleman contends that the Auction Reform Act of 2002²⁴ identifies it as eligible to participate in Auction No. 44.²⁵ We disagree. Among other things, the Auction Reform Act required that the Commission take certain actions with respect to scheduling the auction of Lower 700 MHz band licenses.²⁶ The Auction Reform Act defines the entities that are eligible to bid in a rescheduled auction of the C and D block licenses in that band.²⁷ Section 309(j)(5)(C)(ii), added by the Auction Reform Act, provides that: "[t]he entities that shall be eligible to bid in the auction of the C-block and D-block licenses . . . shall be those entities that were qualified entities, and that submitted applications to participate in auction 44, by May 8, 2002, as part of the original auction 44 short form filing deadline."²⁸ Pursuant to this language, the Bureau announced that previously identified qualified bidders among the entities that submitted applications to participate in Auction No. 44 by May 8, 2002, would be the only parties eligible to participate in the rescheduled Auction No. 44.²⁹ Coleman did not become a qualified bidder because it failed to timely submit its upfront payment. Thus, the provisions of the Auction Reform Act, do not make Coleman eligible to participate in the rescheduled Auction No. 44.

We also disagree with Coleman's assertion that the Bureau's decision to permit qualified bidders not departing Auction No. 44 to supplement their upfront payments essentially extended the deadline for non-qualified bidders to submit upfront payments.³⁰ Section 309(j)(5)(C)(ii) limits *who* is eligible to

²¹ Waiver Request at 3.

²² 47 U.S.C. §§ 309(j)(3)(B) and (j)(4)(D).

²³ *Melcher v. FCC*, 134 F.3d 1143, 1154-55 (D.C. Cir. 1998).

²⁴ Auction Reform Act of 2002, Pub. L. No. 107-195, 116 Stat. 715 ("Auction Reform Act").

²⁵ Supplement to Waiver Request at 1-2.

²⁶ See Auction No. 44 Revised Schedule, License Inventory, and Procedures, *Public Notice*, DA 02-1491 (rel. June 26, 2002) ("*Auction No. 44 Revised Schedule Public Notice*").

²⁷ Auction Reform Act, sec. 3 (adding para. 15 (C)(ii) to 47 U.S.C. § 309 (j)).

²⁸ *Id.*

²⁹ *Auction No. 44 Revised Schedule Public Notice* at 2.

³⁰ Supplement to Waiver Request at 2.

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participate in the rescheduled Auction No. 44, but not *what* those parties may bid on or *how* their maximum initial eligibility is to be determined.³¹ Accordingly, in light of the significant changes to the Auction No. 44 license inventory required by the Auction Reform Act, the Bureau provided qualified bidders with flexibility to select additional licenses and supplement their upfront payments.³² The Bureau's actions to maximize competition within the pool of qualified bidders do not alter the limitations the Auction Reform Act imposes on which entities are eligible to participate in Auction No. 44.

For the reasons discussed above, Coleman's request for a waiver of the upfront payment deadline is denied. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's rules.³³

Sincerely,

Margaret W. Wiener
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

³¹ See Auction No. 44 Revised Schedule, License Inventory, and Procedures, Petition for Reconsideration by Spectrum Holdings, I, LP, *Memorandum Opinion and Order*, DA 02-1817 (rel. July 25, 2002).

³² *Id.*

³³ 47 C.F.R. § 0.331.