

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

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| In the Matter of Application of |) | |
| |) | |
| PVT NETWORKS, INC. |) | FCC File No. 0000137330 |
| |) | |
| Request for Waiver of Sections |) | |
| 1.2110(b) and 101.1209(e) |) | |

ORDER

Adopted: September 25, 20000

Released: September 27, 2000

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us two requests by PVT Networks, Inc. (PVT),¹ seeking a waiver of Sections 1.2110(b) and 101.1209(e) of the Commission's Rules.² Specifically, PVT requests a waiver of Sections 1.2110(b) and 101.1209(e) to permit it to exclude the gross income of its affiliate Mayberry Farm, Inc. (Mayberry Farm) and thus qualify as a very small business entity for the purposes of the 39 GHz band Auction (Auction No. 30). For the reasons discussed below, we deny PVT's request.

II. BACKGROUND

2. On November 23, 1999, the Commission issued a public notice announcing the start of Auction No. 30 on April 11, 2000.³ Short-form applications, FCC Form 175, for Auction No. 30 had to be filed by March 13, 2000,⁴ at which time, the applicants were required to indicate their designated

¹ PVT Networks, Inc., Waiver Request (filed May 23, 2000) (Waiver Request); *see also* PVT Networks, Inc., FCC Form 175, Exhibit C (filed Mar. 13, 2000). On March 13, 2000, in its FCC Form 175 submission PVT also requested a waiver of Section 101.1209(e) of the Commission's Rules. Because these requests seek the same relief, we will address them simultaneously.

² 47 C.F.R. §§ 1.2110(b)(4), 101.1209(e) provides that "[a]n individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an application . . . if such individual or entity: (i) Directly or indirectly control or has the power to control the applicant, or (ii) Is directly or indirectly controlled by the applicant, or (iii) Is directly or indirectly controlled by third parties that also controls or has the power to control the applicant, or (iv) Has an "identity of interest" with the applicant."

³ Auction of Licenses for Fixed Point-to-Point Microwave Services in the 38.6-40.0 GHz (39 GHz) Band Scheduled for April 11, 2000, *Public Notice*, DA 99-2624 , Report No. AUC-99-30-A (rel. Nov. 23, 1999).

⁴ Auction of Licenses for Fixed Point-to-Point Microwave Services in the 38.6-40.0 GHz (39 GHz) Band, *Public Notice*, DA 00-112, Report No. AUC-99-30-B at 11 (rel. Jan. 21, 2000).

entity status. In its short-form application, PVT indicated that it was filing as a very small business.⁵ PVT determined that its combined average gross revenues, including that of its affiliates and its attributable interests was \$14,824,714⁶ if it excluded the revenues (\$719,106) of the Mayberry Farm, personal farm of PVT's Secretary Treasurer, Robert Mayberry (Mayberry).⁷ Mayberry is a board member and officer of both the applicant,⁸ PVT, and the applicant's real party in interest, Peñasco Valley Telephone Cooperative, Inc. (PVTC). Mayberry also concedes an ownership interest in PVTC as a subscriber to the company's telephone services.⁹ Simultaneously with the submission of its short-form application, PVT submitted a request for a waiver of Sections 1.2110(b) and 101.1209(e) of the Commission's Rules seeking to exclude the income Mayberry derived from Mayberry Farm.¹⁰

3. Auction No. 30 closed on May 8, 2000, with twenty-nine winning bidders for 2,173 licenses. PVT was the winning bidder for ten licenses in Auction No. 30 - - BEA136C, BEA136D, BEA136F, BEA136H, BEA136I, BEA136K, BEA136L, BEA136M, BEA157H and BEA157M.¹¹ On May 23, 2000, PVT filed its long-form application, FCC Form 601.¹² PVT filed a request for a waiver of Sections 1.2110(b) and 101.1209(e) of the Commission's Rules with its long-form application.¹³ PVT's applications were accepted for filing on June 28, 2000.¹⁴

III. DISCUSSION

4. PVT requests that we exclude from PVT's gross revenue the income generated by Mayberry Farm.¹⁵ PVT states that the average gross revenues for the three preceding years for Mayberry Farm is \$719,106.¹⁶ Further, PVT states that if we determine that Mayberry Farm is an affiliate of PVT, then the combined gross revenues of PVT and its affiliates would exceed \$15 million, and PVT would not

⁵ PVT Networks, Inc. FCC Form 175 (filed Mar. 13, 2000) (FCC Form 175). 47 C.F.R. § 101.1209(b)(1)(2) provides that "[a] very small business is an entity that together with its affiliates and persons or entities that hold attributable interests in such entity and their affiliates, has average gross revenues that are not more than \$15 million for the preceding three years."

⁶ FCC Form 175, Exhibit C.

⁷ *Id.*

⁸ Waiver Request at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 39 GHz Band Auction Closes, *Public Notice*, Report No. AUC-30-E (rel. May 10, 2000).

¹² PVT Networks, Inc., Long-form application (filed May 23, 2000).

¹³ Waiver Request.

¹⁴ Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, *Public Notice*, Report No. 570 (rel. June 28, 2000).

¹⁵ Waiver Request at 1.

¹⁶ *Id.*

be eligible as a very small business.¹⁷ In that event, PVT requests a waiver of Sections 1.2110(b) and 101.1209(e).

5. PVT argues that the revenues generated from Mayberry Farm provide personal income to Mayberry and that the farm has no business relationship with PVT, and is therefore not an affiliate of PVT.¹⁸ PVT further argues that if Mayberry Farm were organized as a sole proprietorship, its revenues would be treated as personal income to Mr. Mayberry and thus would not be attributable income for eligibility purposes.¹⁹ We disagree.

6. Under the Commission's Rules, a very small business is an entity that, together with its affiliates and person or entities that hold any interest in the applicant and its affiliates, has average gross revenues that are not more than \$15 million for the preceding three years.²⁰ Furthermore, an individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity, *inter alia*, "[i]s directly or indirectly controlled by a third party . . . that also controls or has the power to control the applicant"²¹

7. We believe that the facts clearly establish that, as a board member and officer of both the applicant, PVT, and the applicant's real party in interest, PVTC, Mayberry is an affiliate of the applicant.²² Further, we believe that Mayberry's ownership of the farm is sufficient to establish the indicia of control necessary to demonstrate Mayberry's attributable interest in Mayberry Farm and consequently, Mayberry Farm's affiliation with the applicant, PVT.²³ Accordingly, we believe that the income of Mayberry Farm should be included in PVT's gross revenues under Section 101.1209(e) of the Commission's Rules.

8. PVT also contends that the revenues of Mayberry Farm should be treated as personal income and thus excluded from total gross revenues.²⁴ As previously explained by the Commission, personal income of an individual is a part of personal net worth and not attributable.²⁵ However, we note

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 47 C.F.R. §§ 1.2110(b)(1), 101.1209(b)(1)(ii).

²¹ 47 C.F.R. § 1.2110(b)(4)(i)(C).

²² See 47 C.F.R. §§ 1.2110(b)(4)(ii)(B)-(C), 1.2110(b)(4)(iv), 101.1209(e)(2). Under the Commission's Rules, the indicia of control may be inferred by virtue of one's stock ownership or position as a manager, officer, or key employee. Mayberry also holds a "subscriber" ownership interest in PVTC, which may also be sufficient basis to establish affiliation.

²³ See 47 C.F.R. §§ 1.2110(b)(4)(i)(C), 101.1209(e).

²⁴ Waiver Request at 1.

²⁵ Amendments of Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, *Report and Order*, WT Docket No. 99-238, FCC 00-272, at ¶ 88 (rel. Aug 1, 2000).

that our affiliation rules treat all affiliates of a controlling interest as affiliates of the applicant²⁶. Thus, although we do not attribute the personal income of an individual with a controlling interest in an applicant, if this individual has a controlling interest in another entity our affiliation rules would make attributable to the applicant the gross revenues of that entity.²⁷ Thus, the income from Mayberry Farm is attributable to PVT.

9. We now address PVT's waiver request. Pursuant to the Commission's Rules, we may grant a request for waiver when (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.²⁸ Our review of the facts before us indicates that grant of a waiver is not warranted in this instance because PVT failed to satisfy the waiver standard.

10. Specifically, PVT fails to state why the underlying purpose of sections 1.2110(b) and 101.1209(b) of the Commission's Rules would not be served or would be frustrated by application to the instant matter and that a grant of the waiver would be in the public interest. Sections 1.2110(b) and 101.1209(b) of the Commission's Rules are intended to promote small business participation in spectrum auctions.²⁹ Although our decision to deny PVT's request means that it will not be able to use a thirty-five percent bidding credit to lower the cost of its winning bid, it does not foreclose PVT's opportunity to use a twenty-five percent bidding credit as a small business.³⁰ It is for this same reason, in addition to its failure to state any unique or unusual factual circumstances, that we conclude that PVT has not demonstrated the lack of a reasonable alternative to justify its waiver. Thus, we deny PVT's requests for waiver.

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 1.925, 1.2110 and 101.1209 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.2110 and 101.1209, PVT Networks, Inc.'s requests for waiver filed on March 13, 2000, and May 23, 2000, respectively, ARE DENIED.

12. IT IS FURTHER ORDERED that application FCC File No. 0000137330 filed by PVT Networks, Inc. on March 13 2000, SHALL BE PROCESSED by the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch in accordance with this decision and the applicable

²⁶ *Id.*

²⁷ *See id.* citing 47 C.F.R. § 1.2110(b)(4). *See also* Implementation of Section 309(j) of the Communications Act - - Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 421 ¶ 30 (1994) (explaining that the affiliation rules make the personal net worth rules largely unnecessary since most wealthy individuals are likely to have their wealth closely tied to ownership of another business.)

²⁸ *See* 47 C.F.R. § 1.925(b)(3)(i)-(ii).

²⁹ *See* 47 C.F.R. §§ 1.2110(b)(1), 1.2110(b)(3), Amendment of Part 1 of the Commission's Rules -Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997).

³⁰ *See* 47 C.F.R. §§ 1.2110(b)(1), 101.1208(a).

Commission Rules.

13. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau