



FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

DA 00-2760

Adopted: December 6, 2000

Released: December 12, 2000

Ms. Lynn R. Charytan
Wilmer Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037

Dear Ms. Charytan:

This letter responds to the Request for Waiver that you filed on November 30, 2000 on behalf of your client, MPCS Wireless, Inc. ("MPCS").¹ MPCS requests that we waive the upfront payment deadline for Auction No. 35 due to the failure of MPCS's bank, Chase Manhattan Bank ("Chase"), to execute MPCS's wire transfer instructions in a timely manner, resulting in Chase's failure to transfer funds from MPCS to the Commission's account at Mellon Bank before the deadline. For the reasons set forth below, we grant MPCS's request.

To obtain a waiver of the Commission's competitive bidding rules,² MPCS 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 there has no reasonable alternative.³

On October 5, 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 November 27, 2000.⁴ The Commission also warned applicants that "[f]ailure to deliver the upfront payment by the November 27, 2000 deadline will result in dismissal of the application and disqualification from participation in the auction."⁵

¹ See Request for Waiver of MPCS Wireless, Incorporated for the Upfront Payment Deadline for Auction No. 35 (November 30, 2000) ("Request").

² 47 C.F.R. § 1.2106(c).

³ 47 C.F.R. § 1.925(b)(3).

⁴ See "C and F Block Broadband PCS Spectrum Auction Scheduled for December 12, 2000; Notice and Filing Requirements for 422 Licenses in the C and F Block Broadband PCS Spectrum Auction; Minimum Opening Bids, Upfront Payments and Other Procedural Issues," *Public Notice*, DA 00-2259 (rel. October 5, 2000) ("Auction No. 35 Procedures Public Notice").

⁵ See *Auction No. 35 Procedures Public Notice* at Section III.D.

MPCS contends that its failure to timely submit its upfront payment was the direct result of an unexplained failure by Chase to execute MPCS's wiring instructions before the upfront payment deadline. Specifically, on November 27, 2000, shortly after 4:00 p.m. EST,⁶ MPCS's lenders wired funds to Chase for credit to MPCS's account.⁷ At 4:18 p.m., MPCS's representative instructed Chase to initiate the wire transfer of its \$30 million upfront payment to the FCC's lockbox at Mellon Bank.⁸ However, due to an incorrect ABA routing number provided by Chase, \$5 million of the \$30 million total upfront payment had been routed from one of MPCS's lenders to the wrong Chase branch and could not be credited to MPCS's account until approximately 5:00 p.m.⁹ Thus, it was not until shortly after 5:00 p.m. that Chase began processing the wire transfer to Mellon Bank. After Chase had begun processing the wire transfer, a supervisor of Chase's branch manager intervened and instructed the branch manager not to process the wire transfer until the next business day.¹⁰ MPCS is unable to provide an explanation for the supervisor's action.¹¹ MPCS contends that when it was informed of this decision at approximately 5:30 p.m., its representatives immediately contacted senior Chase officials.¹² The senior official authorized the wire transfer to Mellon Bank at 6:20 p.m.¹³ Chase completed the wire transfer to Mellon Bank at 6:31 p.m., approximately 30 minutes after the upfront payment deadline.¹⁴

MPCS argues that it should be granted a waiver of the upfront payment deadline because it took all reasonable steps in advance of the deadline to ensure that the payment would be submitted to the Commission on time; MPCS's payment would have been submitted on time but for circumstances outside of MPCS's control; MPCS had sufficient funds available to cover the

⁶ Although MPCS's Request describes pertinent events using Central Standard Time (CST), in this letter all events are expressed in Eastern Standard Time (EST).

⁷ See Declaration of Dennis G. Spickler at ¶ 7, attached to the Request.

⁸ *Id.*

⁹ Letter from Antonio T. Torres, Vice President and Branch Manager, Campbell Centre Branch, Chase Manhattan Bank at 2 (November 20, 2000) ("Torres Letter"), attached to the Request. MPCS states that these funds had to be reclaimed by the lender and rewired to the correct branch. Chase extended its 5:00 p.m. wire transfer deadline to 5:30 p.m. to ensure that the transfer to Mellon Bank could be completed by the Commission's 6:00 p.m. deadline. Chase did not begin processing the wire transfer until after 5 p.m.

¹⁰ Request at 6.

¹¹ *Id.*

¹² *Id.* at 6-7. MPCS's local counsel contacted the general counsel for Chase in Texas. After being informed of the decision, Chase's general counsel reportedly instructed the designated Chase branch, by telephone, to wire the funds to Mellon Bank as directed by MPCS. *Id.* See also Declaration of Dennis G. Spickler at ¶ 11.

¹³ Torres Letter at 2.

¹⁴ Request at 7. The Federal Reserve held the wire at the Federal Funds Control Desk overnight, and as a result, the wire did not arrive at Mellon bank until early the next morning. *Id.*

upfront payment so that it is clear that the delay in payment was not a deliberate effort to delay payment; and MPCCS attempted to confirm receipt by Mellon Bank of the upfront payment and performed sufficient due diligence to overcome any error in the submission of payment. Although we believe that MPCCS could have chosen a payment method that avoided last minute problems, on the basis of the record before us, we conclude that MPCCS has demonstrated unique circumstances sufficient to justify the grant of a waiver.

We believe that MPCCS had sufficient time to submit its upfront payment prior to the payment deadline. Nevertheless, MPCCS initiated processing of the wire payment by faxing a completed FCC Form 159 to Mellon Bank at 3:34 p.m. on the day of the payment deadline.¹⁵ This left little time for MPCCS to reasonably react to unexpected contingencies that periodically arise during the wire transfer process. MPCCS could have initiated the wire transfer process several days ahead of the deadline.¹⁶ 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.”¹⁷ In this case, MPCCS chose to make its upfront payment using a complicated series of transactions. MPCCS could have simplified its plan or not waited until the last part of the day the payment was due to initiate that plan.

We also find, however, that MPCCS performed sufficient due diligence to overcome any error in the submission of its payment. MPCCS’s attentiveness to the payment process almost succeeded, but for the last minute intervention of a bank employee. First, MPCCS exercised reasonable diligence by discussing its wire transfer arrangement with the bank five days before the planned transaction, and again on the day the transaction was to take place. Second, MPCCS exercised reasonable diligence in checking on the status of the wire transfer to Mellon Bank. When Chase suspended processing of the wire transfer, MPCCS, to its credit, persuaded Chase to continue processing the transaction *before the deadline*. Despite MPCCS’s notable attention to the details of the wire transfer, and its successful intervention when a Chase supervisor instructed the branch manager to suspend the wire transfer, MPCCS’s effort to make timely payment was foiled at the last minute.¹⁸ Moreover, it is clear from the record that MPCCS had sufficient funds available to cover its upfront payment at the time of the deadline and the wire transfer was effectuated immediately on the next business day, causing only a brief delay.¹⁹ Finally, MPCCS confirmed

¹⁵ *Id.* at 5. In its fax transmission, MPCCS indicated it would be wiring a \$30 million upfront payment later that afternoon. *Id.*

¹⁶ *See, e.g.,* Application of Ramona Lee Hayes-Bell for A New FM Construction Permit on Channel 236A at Pahrump, Nevada, *Memorandum Opinion and Order*, DA 00-1537 (rel. August 7, 2000) (“*Hayes-Bell*”) (granting a request for waiver of the upfront payment deadline where the applicant presented wire transfer instructions to the bank four days before the payment deadline).

¹⁷ *Auction No. 35 Procedures Public Notice* at Section III.D.1.

¹⁸ *See* Declaration of Dennis G. Spickler at ¶ 11, appended as an attachment to the Request.

¹⁹ *See* Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless

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receipt of the transfer and notified the Auction and Industry Analysis Division as soon as it discovered that its payment was not timely.²⁰ Therefore, we conclude that a waiver of the upfront payment deadline is warranted in this case.

This action is taken under delegated authority pursuant to Section 0.331 of the Commission's rules.²¹

Sincerely,

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

Telecommunications Bureau, to Mr. Timi Okoinyan, President and CEO, Trompex Corporation, at 2 (February 14, 2000) (wire transfer was effectuated immediately on the next business day, causing only a brief delay).

²⁰ In *Hayes-Bell*, in which a request for waiver of the upfront payment deadline was granted, applicant did not learn of the missed deadline until four days after the deadline had passed, and did not submit her upfront payment until ten days after the deadline had passed.

²¹ 47 C.F.R. § 0.331.