

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

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

ORDER ON RECONSIDERATION

Adopted: July 3, 2001

Released: July 5, 2001

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

I. INTRODUCTION

1. We have before us a petition for reconsideration filed by PVT Networks, Inc. (PVTN) on October 27, 2000.¹ PVTN seeks reconsideration of the *Farm Attribution Order* released by the Public Safety and Private Wireless Division (Division) on September 27, 2000.² The Division determined that PVTN was not qualified as a "very small business" for purposes of Auction No. 30, the auction of licenses for fixed point-to-point microwave services in the 38.6 to 40.0 GHz band (39 GHz band).³ For the reasons set forth below, we conclude, based upon the additional information PVTN provides in its Petition, that Mr. Mayberry is not an affiliate of PVTN. Therefore, we grant PVTN's Petition and conclude that PVTN is qualified as a "very small business" for purposes of Auction No. 30 and may receive a thirty-five percent bidding credit.

II. BACKGROUND

A. Auction No. 30

2. On November 23, 1999, the Commission issued a public notice announcing the start of Auction No. 30 on April 11, 2000. According to the public notice, short-form applications, FCC Form 175s, were required to be filed by March 13, 2000, at which time applicants were required to indicate whether they were filing as a "designated entity"(DE).⁴ Under certain circumstances, a DE may be eligible to receive bidding credits.

¹ PVT Networks, Inc., Petition for Reconsideration (filed Oct. 27, 2000) (Petition).

² PVT Networks, Inc., *Order*, 15 FCC Rcd 19105 (WTB PSPWD 2000) (*Farm Attribution Order*).

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 47 C.F.R. § 1.2110(a).

3. On January 21, 2000, the Commission issued a public notice announcing the procedures and minimum opening bids for Auction No. 30.⁵ Among those procedures were the eligibility criteria for bidding credits, which were available to “small businesses” and “very small businesses.”⁶ According to the public notice, a “very small business,” an entity with average gross revenues of not more than \$15,000,000 for the preceding three years, would receive a thirty-five percent discount on its winning bid, while a “small business,” an entity with average gross revenues of not more than \$40,000,000 for the preceding three years, would receive a twenty-five percent discount.⁷

4. On March 13, 2000, PVTN filed its FCC Form 175 and indicated that it was filing as a “very small business.”⁸ Specifically, it stated that PVTN’s average gross revenues for the preceding three years was \$7,457,696, while that of its parent, Peñasco Valley Telephone Cooperative (PVT), was \$7,367,018, for combined average gross revenues of PVTN, its affiliates, and their attributable interests of \$14,824,714. Although PVTN disclosed the revenues of Mayberry Farm, owned by Robert Mayberry, a director and Secretary-Treasurer of PVT and PVTN, PVTN did not include the revenues of Mayberry Farm, a personal farm incorporated under the name Mayberry, Inc., in its calculation of the combined average gross revenues of PVTN. PVTN did not include those revenues on the basis that Mayberry Farm provides personal income to Mr. Mayberry and has no business relationship to PVTN; and therefore, according to PVTN, Mayberry Farm should not be treated as an affiliate of PVTN.⁹ In the event the Commission concluded that Mayberry Farm was an affiliate of PVTN, PVTN requested a “limited waiver of Rule Section 101.1209(e) to the extent that it would permit the applicant to exclude the gross revenues of Mayberry Farm and retain very small business status for purposes of Auction No. 30.”¹⁰ In support of its waiver request, PVTN stated that although Mr. Mayberry is a director of both PVT and PVTN, neither Mr. Mayberry nor any member of his family owns or invests in PVT or PVTN.¹¹ Moreover, PVTN states, Mr. Mayberry’s participation in the affairs of PVTN and PVT is in the nature of community service.¹² Mayberry Farm’s average gross revenues for the preceding three years were \$719,106.¹³

5. On May 8, 2000, Auction No. 30 closed.¹⁴ PVTN was the high bidder for ten licenses in two Basic Trading Areas in southeastern New Mexico and west Texas.¹⁵ PVTN’s gross bid for these

⁵ Auction of Licenses for Fixed Point-to-Point Microwave Services in the 38.6 to 40.0 (39 GHz) Band Minimum Opening Bids and Other Procedural Issues, *Public Notice*, DA 00-112, Report No. AUC-99-30-B (rel. Jan. 21, 2000).

⁶ *See id.* at 14.

⁷ *Id.* at 15; 47 C.F.R. § 101.1208(a).

⁸ PVT Networks, Inc. FCC Form 175 (filed Mar. 13, 2000).

⁹ *Id.* at Exhibit C.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ 39 GHz Band Auction Closes Winning Bidders of 2,173 Licenses Announced, *Public Notice*, DA 00-1035, Report No. AUC-30-E (Auction No. 30) (rel. May 10, 2000).

licenses was \$87,600.¹⁶ PVTN calculated that its bid, less the thirty-five percent bidding credit for very small businesses, was \$56,940.¹⁷

6. On May 23, 2000, PVTN submitted its long-form application, FCC Form 601. In this application, PVTN stated that it:

believes that the personal farm business of Robert Mayberry is not an affiliate of the Applicant. The information provided . . . regarding Mayberry farm has been included below and in Applicant's short-form application out of an abundance of caution. . . . Mayberry, Inc. is a personal farm business which is owned by Robert Mayberry, who is Secretary-Treasurer and a Director of the Applicant. Mr. Mayberry's farm operation has no business relationship with the Applicant or any of the Applicant's affiliates.¹⁸

PVTN attached a waiver request to FCC Form 601 requesting that the Commission grant a limited waiver of Section 101.1209(e) of the Commission's Rules to the extent that it would permit PVTN to exclude the gross revenues of Mayberry Farm and retain its very small business status for the purposes of Auction No. 30.¹⁹

B. Farm Attribution Order and Petition for Reconsideration

7. On September 27, 2000, the Division released the *Farm Attribution Order* in which we determined that Mayberry Farm was an affiliate of PVTN and denied PVTN's waiver request. We stated:

We believe that the facts clearly establish that, as a board member and officer of both the applicant, PVT[N], and the applicant's real party in interest, PVT[], Mayberry is an affiliate of the applicant. 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[]. Accordingly, we believe that the income of Mayberry Farm should be included in PVT[N]'s gross revenues under Section 101.1209(e) of the Commission's Rules.²⁰

We further stated that "[u]nder 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 PVT[], which may also be [a] sufficient basis to establish affiliation."²¹

(Continued from previous page) _____

¹⁵ Petition at 5.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ PVT Networks, Inc. FCC Form 601, Exhibit A (filed May 23, 2000) (PVTN Form 601).

¹⁹ *Id.* at Exhibit F.

²⁰ *Farm Attribution Order*, 15 FCC Rcd at 19107 ¶ 7.

²¹ *Id.* at n.21.

8. In denying PVTN's waiver request we stated "[a]lthough our decision to deny PVT[N]'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[N]'s opportunity to use a twenty-five percent bidding credit as a small business."²² We therefore concluded that PVTN had not shown how the purpose of Sections 1.2110(b) and 101.1209(e) of the Commission's Rules, which is intended to promote small business participation in spectrum auctions, would be frustrated.²³ We further found that PVTN did not present any unique or unusual circumstances that would justify a waiver.²⁴

9. As a consequence of the *Farm Attribution Order*, PVTN qualified as a "small business" for purposes of Auction No. 30. Instead of paying \$56,940 for the licenses it won, presuming it was a "very small business," PVTN was required to pay \$65,700, an increase of \$8,760.²⁵

10. On October 27, 2000, PVTN filed its Petition. PVTN maintains that Mayberry Farm is not an affiliate of PVTN and further argues that if Mayberry Farm is found to be an affiliate of PVTN, then the Division should grant a waiver based on public interest considerations.²⁶ PVTN states that to determine that Mayberry Farm is an affiliate of PVTN, the Division "appears to have found that Mr. Mayberry exercises *de facto* control over PVTN."²⁷ PVTN argues, however, that Mr. Mayberry does not exercise *de facto* control over PVTN and states that "[w]hile holding certain officer or director positions with a company can be a circumstance to consider in evaluating *de facto* control, having officer/director status by itself has not justified a finding of control."²⁸ In this instance, PVTN maintains, Mr. Mayberry's involvement is insignificant.²⁹ PVTN insists that Mr. John C. Metts, the Chief Executive Officer/General Manager of PVTN actually controls PVTN.³⁰

11. PVTN argues in the alternative that we should waive Sections 1.2110(b) and 101.1209(e) of the Commission's Rules because the main purpose "underlying the affiliation rules is to prevent larger commercial firms from spinning off a 'front' company to compete against legitimate small businesses."³¹ According to PVTN, "it is clear that neither PVTN nor its parent company, a not-for-profit rural telephone cooperative, is a large commercial firm."³²

²² *Id.*, 15 FCC Rcd at 19108 ¶ 10.

²³ *Id.*

²⁴ *Id.*

²⁵ Petition at 3.

²⁶ *Id.* at 1.

²⁷ *Id.* at 3.

²⁸ *Id.* at 5-6.

²⁹ *Id.* at 6.

³⁰ *Id.* at 7.

³¹ *Id.* at 9-10.

³² *Id.* at 10.

III. DISCUSSION

12. Under Section 101.1209(b)(1)(ii) of the Commission's Rules, an entity may qualify as a "very small business" if the entity 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."³³ According to Section 101.1209(e) of the Commission's Rules:

An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant (both referred to herein as 'the applicant') if such individual or entity: (i) [d]irectly or indirectly controls or has the power to control the applicant, or (ii) [i]s directly or indirectly controlled by the applicant, or (iii) [i]s directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant; or (iv) [h]as an 'identity of interest' with the applicant.³⁴

In this case, the pertinent question is whether Mr. Mayberry controls PVT and PVTN. "Control" includes both *de jure* and *de facto* control.³⁵ Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock.³⁶ *De facto* control is determined on a case-by-case basis.³⁷ Because *de facto* control is determined on a case-by-case basis, we consider the six factors enumerated in *Intermountain Microwave*³⁸ to determine whether Mr. Mayberry has *de facto* control over PVTN. The six *Intermountain Microwave* factors are: (1) Who controls daily operations?; (2) Who is in charge of employment, supervision, and dismissal of personnel?; (3) Does the licensee have unfettered use of all facilities and equipment?; (4) Who is in charge of payment of financing obligations, including expenses arising out of operating?; (5) Who receives monies and profits from the operation of the facilities?; and (6) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?³⁹ An applicant's "representations as to its intention and related contractual provision are relevant, but the weight to be ascribed to these representations must be evaluated in light of the entire record."⁴⁰

³³ 47 C.F.R. § 101.1209(b)(1)(ii) (2000).

³⁴ 47 C.F.R. § 101.1209(e) (2000).

³⁵ Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz, WT Docket No. 97-82, *Second Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600, 18662 ¶ 151 (1997).

³⁶ *Id.*, 12 FCC Rcd at 18663 ¶ 151.

³⁷ *Id.*

³⁸ Nonbroadcast and General Action Report No. 1142, "Applications for Microwave Transfers to Teleprompter Approved with Warning," *Public Notice* (by the Commission *en banc*), 12 FCC 2d 559 (1963), 24 Rad. Reg. (P&F) 983 (1963) ("*Intermountain Microwave*").

³⁹ Application of Baker Creek Communications, LP For Authority to Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas, *Memorandum Opinion and Order*, 13 FCC Rcd 18709, 18713-14 ¶ 7 (WTB 1998) (citing *Telephone and Data Systems v. FCC*, 19 F. 3d 42, 48 (D.C. Cir. 1994)).

⁴⁰ *Id.*, 13 FCC Rcd at 18714 ¶ 8 (1998) (citations omitted).

13. In this case, based upon the additional information PVTN provides in its reconsideration petition, we conclude that Mr. Mayberry, as an individual, does not exercise *de facto* control over PVTN. Initially, we note that under the attribution rules that apply to PVTN's application, Mr. Mayberry's status as an officer and director by themselves do not necessarily mean that Mr. Mayberry has *de facto* control over PVTN for purposes of Auction No. 30. In this regard, we note that in *DCR PCS*,⁴¹ the Wireless Telecommunications Bureau (Bureau) determined that an officer, director, and member of DCR PCS' control group did not control DCR PCS because he was unable to override the authority of the other two members of the control group.⁴² Also in *DCR PCS*, the Bureau found that Westinghouse, a shareholder, which was one of four members of the auction committee and which had power to veto a change of control of DCR PCS, did not possess *de facto* control over DCR PCS, and therefore, was not an affiliate.⁴³ The affiliation rules used in *DCR PCS* are substantively the same as the affiliation rules applied in Auction No. 30.⁴⁴ Accordingly, we conclude that for purposes of Auction No. 30, Mr. Mayberry's status as an officer and director alone does not indicate Mr. Mayberry controls PVTN.⁴⁵

14. Using the *Intermountain Microwave* factors, we conclude that Mr. Mayberry as an individual does not control PVTN. Mr. Mayberry is not directly involved in PVTN's day-to-day operations. Mr. Mayberry only devotes a few hours a month to PVT business.⁴⁶ He does not have an office at PVTN, and his participation is limited to attending meetings of the board of directors.⁴⁷ Mr. Metts is responsible for supervising, hiring, and firing employees.⁴⁸ There is no evidence in the record that Mr. Mayberry has any special access to PVTN's facilities and equipment. Mr. Mayberry's role concerning financing obligations appears to be limited to his role as one of nine directors of PVTN. The receipt of monies and profits factor supports the conclusion that Mr. Mayberry does not control PVTN because he does not receive any compensation for his services.⁴⁹ Finally, while Mr. Mayberry has a role in determining and carrying out policy decisions as a director of PVTN, he is only one of nine directors.⁵⁰ Mr.

⁴¹ Application of DCR PCS, Inc. Applications for Broadband PCS C Block Licenses, *Order*, 11 FCC Rcd 16849 (WTB 1996) (*DCR PCS*).

⁴² *Id.*, 11 FCC Rcd at 16859 ¶ 29.

⁴³ *Id.*, 11 FCC Rcd at 16861 ¶ 32.

⁴⁴ *See* 47 C.F.R. § 24.720(l) (1996).

⁴⁵ We note that subsequent to Auction No. 30, the Commission revised its attribution rules and that under those new rules, officers and directors will be considered to have *de facto* control over an applicant. *See* Amendment of Part 1 of the Commission's Rules, Competitive Bidding Rules, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15325 ¶ 63 (2000). In that order, the Commission said that "[e]ligibility for small business preferences, however, will be determined based on the attribution rules in effect at the time of an applicant's short-form filing." *Id.*, 15 FCC Rcd at 15327 ¶ 67. In this case, the pertinent attribution rule is 47 C.F.R. § 101.1209(e) because that rule was in effect when PVTN filed its short-form application on March 13, 2000.

⁴⁶ Petition, Declaration of John C. Metts, ¶ 7.

⁴⁷ *Id.* ¶ 5.

⁴⁸ *Id.* ¶ 6.

⁴⁹ *Id.* ¶ 7.

Metts represents that he does not seek separate approval from Mr. Mayberry in setting PVTN's policies.⁵¹ We find, therefore, that Mr. Mayberry's role is similar to the director in *DCR PCS* who did not have *de facto* control because he could not override the authority of the other two members of the control group.⁵² In analyzing all of the *Intermountain Microwave* factors, we conclude that Mr. Mayberry does not exercise *de facto* control over PVT and PVTN.⁵³

15. Given that Mr. Mayberry does not exercise *de facto* control over PVTN, he is not considered an affiliate of PVT and PVTN, and the gross revenues of the Mayberry Farm should be excluded in calculating the combined average gross revenue of PVTN. We will therefore dismiss as moot PVTN's alternative request for waiver. Since PVTN's combined average gross revenue excluding the revenues of Mayberry Farm is under \$15,000,000, it qualifies as a very small business for purposes of Auction No. 30.⁵⁴

IV. CONCLUSION

16. After reviewing the record in this proceeding and applying the *Intermountain Microwave* analysis, we find that Mr. Mayberry does not have *de facto* control over PVTN, and therefore, is not an affiliate of PVTN. Because Mr. Mayberry is not an affiliate of PVTN, Mayberry Farm is not an affiliate of PVTN. Hence, we agree with PVTN that it qualifies as a "very small business" for purposes of Auction No. 30. We therefore find that it is unnecessary to reconsider PVTN'S request to waive Sections 1.2110(b) and 101.1209(e) of the Commission's Rules.

V. ORDERING CLAUSES

17. ACCORDINGLY, IT IS ORDERED that pursuant to Section 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, IT IS ORDERED that the Petition for Reconsideration filed on October 27, 2000 by PVT Networks, Inc., IS GRANTED, to the extent that PVT Networks, Inc. qualifies as a "very small business" for purposes of Auction No. 30.

18. IT IS FURTHER ORDERED that pursuant to Section 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and 1.925 and 1.106 of the

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⁵⁰ *Id.* ¶ 4.

⁵¹ *Id.*

⁵² *DCR PCS*, 11 FCC Rcd at 16859 ¶ 29.

⁵³ We do not necessarily accept Mr. Metts' claim that he exercises *de facto* control over PVTN. See Petition, Declaration of John C. Metts, ¶ 3. We note that Mr. Metts describes his role in part as "implementing the policies of the Board" (*Id.* ¶ 6), which suggests that the Board controls his actions. For purposes of this order, our sole conclusion is that Mr. Mayberry as an individual does not control PVTN.

⁵⁴ Therefore PVTN made an overpayment of \$8,640, which represents the difference in its net bid between the \$65,700 it paid for its licenses as a "small business" and \$56,940, which represents the amount PVTN was required to pay as a "very small business." To request a refund, see and follow the procedures specified in Auction of Licenses for Fixed Point-to-Point Microwave Services in the 38.6 to 40.0 GHz (39 GHz) Band Minimum Opening Bids and Other Procedural Issues, *Public Notice*, DA 00-112, Report No. AUC-99-30-B (rel. Jan. 21, 2000).

Commission's Rules, 47 C.F.R. 1.106, IT IS ORDERED that the request for a wavier of Sections 1.2110(b) and 101.1209(e) of the Commission's Rules, 47 C.F.R. §§ 1.2110(b) and 101.1209(e) filed on October 27, 2000 by PVT Networks, Inc. IS DISMISSED AS MOOT.

19. IT IS FURTHER ORDERED that PVT Networks, Inc. is entitled to be reimbursed \$8,760.

20. This action is taken under delegated authority pursuant to Section 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