

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

In the Matter of)
)
Bell Mountain Communications, Inc.)
Request for Waiver of)
Upfront Payment Deadline in)
Auction No. 30)
)
)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 2001

Released: March 2, 2001

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a petition for reconsideration filed by Bell Mountain Communications, Inc. (“Bell Mountain”) on May 11, 2000.¹ Bell Mountain, an Auction No. 30 applicant, seeks reconsideration of a decision by the Auctions and Industry Analysis Division (“Division”) denying its request for waiver of the Commission’s upfront payment deadline.² Specifically, Bell Mountain requests that the Wireless Telecommunications Bureau (“Bureau”) waive the upfront payment deadline of March 27, 2000. As explained fully below, we deny Bell Mountain’s petition. We find that the Division properly denied Bell Mountain’s waiver request, and accordingly, there is no basis for reconsideration.

II. BACKGROUND

2. On January 21, 2000, the Commission released a Public Notice notifying applicants for Auction No. 30³ that the deadline for submission of upfront payments was 6:00 p.m. (EST) on March 27,

¹ Petition for Reconsideration of Bell Mountain Communications, Inc., filed May 11, 2000 (“Petition”); Supplement to Petition for Reconsideration, filed January 3, 2001 (“Supplement”) (includes arguments based upon a decision issued after the Petition was filed).

² 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) (“*Letter Ruling*”); see also 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) (“Waiver Request”).

³ Auction No. 30 began on April 12, 2000 and closed in round 73 on May 8, 2000. “39 GHz Band Auction Closes; Winning Bidders of 2,173 Licenses Announced,” *Public Notice*, DA 00-1035, (rel. May 10, 2000).

2000.⁴ The Commission also warned applicants “[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.”⁵ On the upfront payment deadline date, Bell Mountain authorized its bank, Riggs & Company (“Riggs”), to transfer funds from the personal account of its president to the Commission’s account at Mellon Bank.⁶ However, Bell Mountain failed to provide Riggs with complete wire transfer instructions.⁷ Further, Riggs failed to follow its own internal procedures for processing Bell Mountain’s wire transfer instructions.⁸ Bell Mountain failed to meet the Commission’s March 27, 2000 deadline for submission of upfront payments.⁹ Bell Mountain subsequently filed a request for waiver of the upfront payment deadline alleging that a failure on the part of Riggs constituted adequate grounds for waiver.¹⁰ The Division denied Bell Mountain’s request.¹¹

III. DISCUSSION

3. As we explain below, Bell Mountain has not demonstrated that grant of its petition for reconsideration would be appropriate.¹² In its Waiver Request and its subsequent Petition, Bell Mountain generally contends waiver would be appropriate because its failure to timely submit its upfront payment was the direct result of an administrative error on the part of Riggs in the processing of its wire transfer request. In its Petition, Bell Mountain also argues that the Division’s *Letter Ruling* is based on several factual misunderstandings that are incorrect and crucial to the Division’s decision.¹³ Finally, Bell Mountain

⁴ 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*, 15 FCC Rcd 850 (2000) (“*Auction No. 30 Public Notice*”).

⁵ *Auction No. 30 Public Notice* at Section III.D.

⁶ Waiver Request at 1.

⁷ *Id.* at 1-2.

⁸ *Id.* at 2.

⁹ See “Auction of Licenses for Fixed Point-to-Point Microwave Service in the 38.6 to 40.0 GHz (39 GHz) Band; 35 Qualified Bidders,” *Public Notice*, 15 FCC Rcd 5748, 5769 (2000) (“*Auction No. 30 Qualified Bidders Public Notice*”).

¹⁰ Waiver Request at 1.

¹¹ *Letter Ruling* at 1.

¹² Since Bell Mountain’s Petition does not rely on facts that have occurred or circumstances that have changed since its Waiver Request, the appropriate standard for review is 47 C.F.R § 1.106(d)(2). Bell Mountain must cite findings of fact and/or conclusions of law it believes to be erroneous and must also state with particularity the respects in which it believes such findings and conclusions should be changed. 47 C.F.R § 1.106(d)(2).

¹³ Petition at 4 (citing Letter to Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Sandra J. Haller, Managing Director, Riggs & Company, dated April 12, 2000 (“Second Riggs Letter”), appended as an attachment to Petition).

contends that the facts in its case are identical to those associated with Auction No. 25 applicant Ramona Lee Hayes-Bell¹⁴ and Auction No. 35 applicant MPCS.¹⁵

4. In both its Waiver Request and subsequent Petition, Bell Mountain fails to establish that: (i) the underlying purpose of the rule would not be served, or would be frustrated by its application in this particular case, and that a grant of the requested waiver would be in the public interest; or (ii) that the unique or unusual factual circumstances of this particular case render application of the rule inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁶

5. Bell Mountain contends that unique and unusual circumstances exist in this case, because it is rare that a well-recognized, large commercial bank would fail to process a wire transfer. Bell Mountain contends that Riggs failed to follow its own internal procedures for processing a client's wire transfer instructions. Further, Bell Mountain argues that Riggs's failure was, in turn, the cause of its failure to meet the upfront payment deadline.¹⁷ The circumstances presented by Bell Mountain do not demonstrate grounds for a waiver. Where, as here, an applicant initiates the wire transfer on the day the upfront payment is due, fails to provide complete wire transfer instructions to its bank, and fails to confirm receipt of the wire transfer through its bank, the applicant has failed to exercise reasonable diligence. As prior decisions in this area demonstrate, upon occasion an applicant will miss an auction deadline where it fails to allow sufficient time to react to unforeseen last minute difficulties.¹⁸ Accordingly, we concur with the Division that grant of a waiver is not warranted and would not be in the public interest. Additionally, as we explain below, Bell Mountain has failed to demonstrate a basis for reconsideration.

¹⁴ See Application of Ramona Lee Hayes-Bell for A New FM Construction Permit on Channel 236A at Pahrump, Nevada, *Memorandum Opinion and Order*, 15 FCC Rcd 14729 (2000) ("*Hayes-Bell*").

¹⁵ 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., DA 00-2760 (rel. December 12, 2000) ("*MPCS*").

¹⁶ 47 C.F.R. § 1.925.

¹⁷ Letter to Mr. Kent Foster from Sandra J. Haller, Managing Director, Riggs & Company, dated April 4, 2000 ("First Riggs Letter"), appended as an attachment to the Waiver Request. In the First Riggs Letter, Riggs explains to the Applicant's president: "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."

¹⁸ See, e.g., Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Mr. Jason Bunch, 15 FCC Rcd 6069 (2000) (applicant initiated processing of the wire payment the day of the payment deadline, leaving little time to become familiar with the requirements of the process and react to unforeseen last-minute difficulties); Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to James A. Rech, Counsel for Landmark Site Development, LLC, 14 FCC Rcd 6479 (1999) (noting that the Commission cautioned Auction No. 23 applicants to discuss arrangements with their banker several days before they planned to make the wire transfer); Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to John D. Szuchan, Counsel for On Target, L.L.C., 14 FCC Rcd 6375 (1999) (request for waiver of the FCC Form 175 filing deadline); Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Cary S. Tepper, Booth Freret Imlay & Tepper, P.C., and Larry D. Jones, DA 99-1903 (September 17, 1999) (noting the importance of planning ahead to account for unforeseen last-minute difficulties).

6. In its Petition, Bell Mountain alleges that the Division made several factual mistakes in the *Letter Ruling*.¹⁹ Based upon the record before us, Bell Mountain fails to demonstrate any factual errors in the Division's *Letter Ruling* meriting reconsideration. Bell Mountain's first contention is that the *Letter Ruling* is incorrect with respect to the amount of time required to implement wiring instructions. In particular, Bell Mountain asserts that the Division incorrectly assumed that wire transfers could not reasonably be initiated and executed on the same day.²⁰ Bell Mountain takes out of context the Division's ruling.²¹ Although it is possible for wire transfers to be initiated and executed on the same day, the processing difficulties experienced by Riggs indicate that upon occasion a successful wire transfer may reasonably require longer than one full day.²² In fact, the First Riggs Letter recognizes that "with a busy operations area" errors can occur to delay same day transfers.²³ With respect to the Commission's auction deadlines, the Commission has repeatedly highlighted the importance of planning ahead to account for unforeseen last-minute difficulties.²⁴ All applicants in Auction No. 30, including Bell Mountain, were warned to avoid untimely payments by discussing arrangements with their banker several days before they plan to make a wire transfer *and to allow sufficient time for the transfer to be initiated and completed* before the deadline.²⁵ Bell Mountain did not provide itself with adequate time to complete the transfer.²⁶ Bell Mountain initiated processing of the wire payment the day of the payment deadline, leaving little time for Bell Mountain to correct any errors or to reasonably react to unexpected contingencies that periodically arise during the wire transfer process.

¹⁹ Petition at 4-6.

²⁰ Riggs states that it "processes hundreds of wire transfers each week, and a domestic wire transfer request takes no longer than a few hours." Letter to Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Sandra J. Haller, Managing Director, Riggs & Company, dated April 12, 2000 ("Second Riggs Letter"), appended as an attachment to Petition.

²¹ See *Letter Ruling* at 2-3 ("The [First Riggs Letter] further indicates that a successful wire transfer may reasonably require longer than one full day").

²² First Riggs Letter, appended as an attachment to the Waiver Request.

²³ See n.17, *supra*.

²⁴ See n.18, *supra*.

²⁵ *Auction No. 30 Public Notice* at Section III.D.1; see also "Auction Notice and Filing Requirements for 528 Multilateration Licenses; Scheduled for December 15, 1999; Minimum Opening Bids and Other Procedural Issues," *Public Notice*, 13 FCC Rcd 18583 18596 (1998) (warning Auction No. 21 applicants to avoid untimely payments by making arrangements early before planning wire transfers); "Auction Notice and Filing Requirements for 168 Local Multipoint Distribution Service Spectrum, Scheduled for April 27, 1999; Minimum Opening Bids and Other Procedural Issues," *Public Notice*, 14 FCC Rcd 2191, 2204 (1998) (warning Auction No. 23 applicants to avoid untimely payments by making arrangements early before planning wire transfers); "Auction Notice and Filing Requirements for 2,499 Paging Upper Band Licenses; Scheduled for February 24, 2000; Minimum Opening Bids and Other Procedural Issues," *Public Notice*, DA 99-1591 at Section 3.C.1 (rel. August 12, 1999) (warning Auction No. 26 applicants to avoid untimely payments by making arrangements early before planning wire transfers).

²⁶ *Letter Ruling* at 2.

7. Bell Mountain's second contention is that the Division erred in the *Letter Ruling* by concluding that Bell Mountain was responsible for not meeting the upfront payment deadline, in part, because it did not confirm receipt of the wire transfer with Mellon Bank.²⁷ We concur with the Division's conclusion. In the First Riggs Letter, Riggs only states that the wire transfer request was never received by its internal center responsible for such requests and that it made an error in not processing the wire transfer request.²⁸ Notably, Bell Mountain does not allege that it confirmed receipt of the wire transfer with Mellon Bank through Riggs. Instead, Bell Mountain merely confirmed that Riggs had received the wire instructions and would ultimately forward payment to Mellon Bank.²⁹ All applicants, including Bell Mountain, were cautioned to "confirm receipt of their upfront payments at Mellon Bank by contacting their sending financial institution."³⁰ Had Bell Mountain contacted Riggs to confirm that Riggs had actually forwarded the payment to Mellon Bank, it would have received notice that the wire transfer had not been received by Mellon Bank. Upon receipt of that information, Bell Mountain through consultation with Riggs may have had a reasonable opportunity to discover and correct the problems associated with this wire transfer.

8. Bell Mountain's third contention is that, in the *Letter Ruling*, the Division incorrectly noted that the lack of an ABA routing number in its facsimile wire instructions was an error that delayed wire transfer.³¹ We disagree. Riggs' statement that the omission of the ABA routing number "alone would not necessarily void the request,"³² does not preclude the possibility that lack of ABA routing numbers will delay or void the request. ABA routing numbers identify the specific bank to receive the electronic funds and ensure that the transferred funds are directed to the location of the receiving bank.³³ Without the use of ABA routing numbers in wire transfer instructions, the possibility of an error in the transmission process is, at a minimum, significantly increased. Thus, the Commission specifically directs applicants to include ABA routing numbers in wire transfer requests.³⁴ In addition to the examples cited above, Bell Mountain's failure to comply with this specific instruction demonstrates that it did not exercise due diligence in this matter.

9. Bell Mountain's fourth contention is that the Division erred in its conclusion that Riggs did not explain that it had made a mistake in the wiring process.³⁵ We disagree. In the First Riggs letter, included

²⁷ Petition at 4-6.

²⁸ First Riggs Letter.

²⁹ Petition at 4-6.

³⁰ *Auction No. 30 Public Notice* at Section III.D.1.

³¹ Petition at 5.

³² Second Riggs Letter at 1.

³³ See 12 C.F.R. Part 229, Appendix A.

³⁴ See *Auction No. 30 Public Notice* at Section III.D.1 (listing the ABA routing number for Mellon Bank, which receives wire transfers for the Commission).

³⁵ Petition at 5.

in Bell Mountain's Waiver Request, Riggs states "please accept [our] apology for the recent error, on our part" and acknowledges responsibility for Bell Mountain's failure to meet the payment deadline. The Division noted in its *Letter Ruling* that Riggs did "not state that a mistake was made in executing the Applicant's specific wire instructions."³⁶ After issuance of the *Letter Ruling*, Bell Mountain provided the Division with the Second Riggs Letter wherein Riggs acknowledges its failure to transmit internally the wire transfer before the payment deadline. However, Riggs' error is not similar to, and does not rise to the level of, the errors made in previous instances where a partial waiver was granted.³⁷ Further, Riggs' error does not erase or diminish the significance of Bell Mountain's failures. Thus, Riggs' error does not relieve Bell Mountain of its responsibility to exercise reasonable diligence in the wire transfer process.

10. Finally, Bell Mountain further contends that the facts of its case are on point with the Bureau's decisions in *Hayes-Bell* and *MPCS*, and accordingly, that a waiver should be granted.³⁸ We disagree. In *Hayes-Bell*, the Bureau reinstated the application of Hayes-Bell after she attributed her delay in meeting the upfront payment deadline to an error by her bank, Nevada State Bank.³⁹ In *Hayes-Bell*, the applicant presented *correct and complete* wire instructions to her bank *four* days before the upfront payment deadline. In contrast, Bell Mountain presented incomplete wire instructions on the day of the upfront payment deadline. In *MPCS*, the Division granted a waiver of the Auction No. 35 upfront payment deadline after the applicant demonstrated that the failure of its bank to execute MPCS's wire transfer instructions in a timely manner resulted in the bank's failure to transfer funds to the Commission before the deadline despite the due diligence exercised by MPCS to overcome the error on the part of its bank.⁴⁰ In *MPCS*, the applicant discussed and arranged for the wire transfer with its bank several days before it planned to make the wire transfer.⁴¹ In the instant case, however, Bell Mountain failed to perform sufficient due diligence before the submission of its payment to overcome errors it made during the transaction. Bell Mountain failed to discuss and arrange for the wire transfer with Riggs several days before it planned to make the wire transfer.⁴² Additionally, Bell Mountain failed to provide complete wire transfer

³⁶ *Letter Ruling* at 3.

³⁷ *See, e.g., Hayes-Bell*, 15 FCC Rcd at 14732-33, ¶¶ 8-9.

³⁸ Waiver Request at 2; Supplement at 1.

³⁹ *Hayes-Bell*, 15 FCC Rcd at 14730 n.5.

⁴⁰ *MPCS* at 3-4.

⁴¹ *Id.* at 3.

⁴² *See* Waiver Request at 1-2.

instructions.⁴³ Unlike MPCS, Bell Mountain was not attentive to the wire transfer process.⁴⁴ Thus, on the facts presented here, Bell Mountain did not exercise reasonable diligence as it failed to check the processing of the wire transfer by Riggs and also failed to confirm receipt of the wire transfer by Mellon Bank. Accordingly, we deny Bell Mountain's Petition and affirm the decision of the Division to deny Bell Mountain's waiver request.

IV. CONCLUSION

11. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 309(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d)(2), and Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Petition for Reconsideration filed by Bell Mountain Communications, Inc. on May 11, 2000, IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham,
Deputy Chief, Wireless Telecommunications Bureau

⁴³ Second Riggs Letter at 1 ("Although the ABA number was not included in the wire transfer instructions forwarded to Riggs . . .").

⁴⁴ MPCS performed sufficient due diligence to overcome any error in the submission of its payment. MPCS exercised reasonable diligence in checking on the status of the wire transfer to Mellon Bank. When Chase suspended processing of the wire transfer, MPCS, to its credit, persuaded Chase to continue processing the transaction before its upfront payment deadline. Despite MPCS'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, MPCS's effort to make timely payment was foiled at the last minute. In addition, MPCS confirmed receipt of the transfer and notified the Auctions and Industry Analysis Division as soon as it discovered that its payment was not timely. *MPCS* at 3.