



FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

DA 03-1581  
May 12, 2003

Ms. Sara F. Leibman, Esq.  
Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Washington, DC 20004

Dear Ms. Leibman:

This letter responds to the Request for Waiver that you filed on April 16, 2003 on behalf of your client, Jeff Scott Cofsky d/b/a Texas License Consultants ("TLC").<sup>1</sup> TLC requests that we waive the upfront payment deadline for Auction No. 48 due to the failure of its law firm to transfer the required funds to the Commission's account at Mellon Bank before the upfront payment deadline. For the reasons set forth below, we grant TLC's request.

To obtain a waiver of the Commission's competitive bidding rules,<sup>2</sup> TLC 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.<sup>3</sup>

On December 20, 2003, the Commission first notified applicants for Auction No. 48 that the deadline for submission of upfront payments was 6:00 p.m. (ET) on April 14, 2003.<sup>4</sup> The Commission also warned applicants that "[f]ailure to deliver the upfront payment by the April 14, 2003 deadline will result in dismissal of the application and disqualification from participation in the auction."<sup>5</sup>

TLC contends that its failure to timely submit its upfront payment resulted from an administrative error on the part of its law firm, Mintz Levin Cohn Ferris Glovsky and Popeo, P.C. ("Mintz Levin"), in processing its wire transfer request.<sup>6</sup> Specifically, on April 9, 2003, Mintz Levin received from TLC a check in the amount of \$81,000 that was deposited in Mintz Levin's client funds account on April 10,

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<sup>1</sup> See Request for Waiver — Expedited Action Requested (April 16, 2003) ("Request"). See also Letter to Gary Michaels, Chief, Legal Branch, Auctions and Industry Analysis Division, from Sara F. Leibman, Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., Re: Jeff Scott Cofsky d/b/a Texas License Consultants; Supplement to Waiver Request (May 1, 2003) ("Supplement").

<sup>2</sup> 47 C.F.R. § 1.2106(c).

<sup>3</sup> 47 C.F.R. § 1.925.

<sup>4</sup> "Lower and Upper Paging Bands Auction Scheduled for May 13, 2003; Notice and Filing Requirements, Minimum Opening Bids and Other Procedural Issues," *Public Notice*, 17 FCC Rcd 27799, 27813 (2002) ("Auction No. 48 Procedures Public Notice").

<sup>5</sup> *Auction No. 48 Procedures Public Notice*, 17 FCC Rcd at 27822.

<sup>6</sup> Request at 10.

2003.<sup>7</sup> Also on April 10, Mintz Levin submitted TLC's completed FCC Form 159 to Mellon Bank, and an attorney in the firm's Washington D.C office faxed wire transfer instructions to Mintz Levin's Client Funds Coordinator ("Coordinator") in the firm's Boston office.<sup>8</sup> TLC explains that, since the Coordinator was out of the office the day after she received the written instructions, *i.e.*, Friday, April 11, 2003, she began the wire transfer process on the date of the upfront payment deadline, Monday, April 14, 2003, at approximately 11:00 a.m.<sup>9</sup> The Finance Department in Mintz Levin's Boston office processes wire transfers through Fleet Bank.<sup>10</sup> At 11:10 a.m., the Coordinator checked Fleet Bank's activity report, which shows all funds going into, and out of, clients' accounts.<sup>11</sup> The Coordinator saw that Mintz Levin had received a "Federal Reference Number," which confirmed that the funds had been released from Fleet Bank into the Federal Reserve system.<sup>12</sup> From approximately 11:10 a.m. to 3:30 p.m. on April 14, 2003, the Coordinator regularly checked Fleet Bank's activity report.<sup>13</sup> TLC claims that, because Mintz Levin received a Federal Reference Number, indicating that the funds had been released by Fleet Bank into the Federal Reserve system, and the activity report did not show any unusual activity, the Coordinator did not believe it was necessary to contact Mellon Bank to confirm the transfer.<sup>14</sup> The last time the Coordinator checked the activity report was at 3:30 p.m. on April 14, 2003, although she left the office that day at 5:00 p.m.<sup>15</sup> At 3:46 p.m., on April 14, Mellon Bank returned the funds to Fleet Bank due to an incorrect account number on the wire transfer form.<sup>16</sup>

TLC contends that the Coordinator did not learn that Mellon Bank had returned the funds until

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<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> Supplement at 1. Mintz Levin maintains that after issuing the Federal Reference Number, the Federal Reserve System forwards the funds to the receiving bank designated on the wiring form. *Id.* Mintz Levin further states that the Federal Reference Number is the only confirmation that the sending bank receives that indicates the funds have been wired. *Id.*

<sup>13</sup> Request at 3 and Declaration of Linda Shea, ¶¶ 3-4, appended as Exhibit A.

<sup>14</sup> Request at 4 and Declaration of Linda Shea, ¶ 3, appended as Exhibit A.

<sup>15</sup> Request at 3-4 and Declaration of Linda Shea, ¶ 4, appended as Exhibit A.

<sup>16</sup> Declaration of Linda Shea, ¶ 7, appended as Exhibit A. Mintz Levin contends that, once the Federal Reference Number is issued, apart from contacting the receiving bank directly, the sending bank will only know whether the funds have actually reached the intended destination if the receiving bank rejects the funds for some reason. Supplement at 1. Mintz Levin contends that that is what happened in TLC's case. *Id.* at 1-2. Mellon Bank attempted to apply the funds based on the incorrect beneficiary account number provided on the wiring form. Thus, Mintz Levin asserts, Mellon Bank sent the funds back to the Federal Reserve and the wiring process was reversed. *Id.*

the morning of April 15, 2003.<sup>17</sup> At that time, she received a voice mail message from an employee at Fleet Bank that had been forwarded to her by another Mintz Levin employee, Mr. Mekonnen, who was on vacation but had retrieved his messages.<sup>18</sup> The voice mail from Fleet Bank to Mr. Mekonnen stated that the \$81,000 wire transfer to Mellon Bank had been returned and would be re-credited to Mintz Levin's account.<sup>19</sup> Mr. Mekonnen forwarded that voicemail to the Coordinator at 5:55 pm on April 14, 2003.<sup>20</sup> The next morning, the Coordinator called Fleet Bank to determine the source of the problem and learned that the funds had been returned because she had mistakenly provided the ABA (routing) number in place of the FCC account number.<sup>21</sup> Thus, the ABA number appeared in both the routing number field and the account number field on the Fleet Bank wire.<sup>22</sup>

TLC contends that but for Mintz Levin's error of providing the ABA number in place of the account number, its funds would have been successfully wired to the appropriate FCC account at Mellon Bank.<sup>23</sup> TLC argues that it should be granted a waiver of the upfront payment deadline because it took reasonable steps in advance of the deadline to ensure that the payment would be submitted to the Commission on time; it had sufficient funds available to cover the upfront payment so that it is clear that the delay in payment was not a deliberate effort to delay payment; it exercised reasonable diligence by initiating the wire transfer process well in advance of the deadline; and its payment would have been submitted on time but for circumstances outside of TLC's control.<sup>24</sup> Although we believe that Mintz Levin could have acted more diligently during the three hours preceding the upfront payment deadline, on the basis of the record before us, we conclude that TLC has demonstrated that grant of a waiver would not frustrate the underlying purpose of the payment deadline.<sup>25</sup>

We believe that TLC and its law firm initiated the wire transfer process sufficiently in advance of the upfront payment deadline to allow for timely payment. TLC ensured that the upfront payment amount of \$81,000 was deposited in Mintz Levin's client funds account three business days before the April 14<sup>th</sup> upfront payment deadline.<sup>26</sup> Mintz Levin, in turn, began the wire transfer process on the morning of April 14, 2003 by having the Coordinator type the wiring information onto the Fleet Bank screen.<sup>27</sup> At 11:10,

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<sup>17</sup> Request at 4 and Declaration of Linda Shea, ¶¶ 4 and 6, appended as Exhibit A.

<sup>18</sup> Declaration of Linda Shea, ¶ 6, appended as Exhibit A, Request and Supplement at 2.

<sup>19</sup> Supplement at 2. This message was left on Mr. Mekonnen's voice mail at approximately 2:40 pm on April 14, 2003. *Id.*

<sup>20</sup> Request at 4 and Supplement at 2.

<sup>21</sup> Request at 4 and Declaration of Linda Shea, ¶ 7, appended as Exhibit A, Request.

<sup>22</sup> Declaration of Linda Shea, ¶ 7, appended as Exhibit A, Request.

<sup>23</sup> Request at 10.

<sup>24</sup> *Id.* at 5-10.

<sup>25</sup> 47 C.F.R. § 1.2106(c).

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.* at 3.

Fleet Bank's activity report showed that TLC's funds had been released to the Federal Reserve system.<sup>28</sup> Mellon Bank received TLC's upfront payment on April 14<sup>th</sup> as evidenced by the fact that later that day Mellon Bank returned those funds to the Fleet Bank account.<sup>29</sup> The full upfront payment amount was received by Mellon Bank a number of hours prior to the payment 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 completed before the deadline."<sup>30</sup> In this case, TLC exercised reasonable diligence by allowing sufficient time to initiate and complete the transfer before the deadline.

We find that TLC would have met the payment deadline but for two administrative errors on the part of Mintz Levin. First, the law firm's Coordinator erred in typing the ABA number in place of the FCC accounting number in preparing the wire transfer. Second, Mintz Levin was not sufficiently attentive to the payment process in the period after the transfer of funds was made. Employees at the firm should have continued to monitor Fleet Bank's activity report after 3:30 p.m. on April 14 and/or should have called Mellon Bank to confirm that TLC's funds had not only been received but had been placed in the proper FCC account. Nevertheless, TLC exercised reasonable diligence by ensuring that sufficient funds were on deposit and available for transfer to Mellon Bank three days before the planned transaction. In addition, TLC's funds were actually received by Mellon Bank and, for a number of hours after such receipt, there was no indication that the funds had been rejected. The call from Fleet Bank advising Mintz Levin of the returned wire was delivered to a Mintz Levin employee who was on vacation at the time. By the time the message was forwarded to Mintz Levin's Coordinator, the payment deadline had passed. Thus, when Mellon Bank rejected the wire transfer, TLC was in no position to continue processing the transaction. Upon realizing that the funds had been returned, Mintz Levin acted immediately to submit a second wire transfer that was successfully completed on the next business day, causing only a brief delay.<sup>31</sup> Finally, although Mintz Levin failed to confirm receipt of the transfer during the last few hours before the payment deadline, it did notify the Auction and Industry Analysis Division as soon as it discovered that TLC's payment was not timely.<sup>32</sup> 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

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<sup>28</sup> Request at 3 and Supplement at 1.

<sup>29</sup> Declaration of Linda Shea, ¶ 7, appended as Exhibit A, Request and Supplement at 1. Fleet Bank's activity report for April 14, 2003 shows that TLC's funds were returned from Mellon Bank at 3:46 p.m. on April 14. Declaration of Linda Shea, ¶ 7, appended as Exhibit A.

<sup>30</sup> *Auction No. 48 Procedures Public Notice*, 17 FCC Rcd at 27823.

<sup>31</sup> See Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless 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).

<sup>32</sup> Request at 4-5; Declaration of Stefani V. Watterson, ¶¶ 7-8, appended as Exhibit B, Request. 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.

Sara F. Leibman, Esq.  
May 12, 2003

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rules.<sup>33</sup>

Sincerely,

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

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<sup>33</sup> 47 C.F.R. § 0.331.