



Federal Communications Commission
Washington, D.C. 20554

December 30, 2004

DA 04-4067

Glenn S. Richards
Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037

Re: Cleartone Corp. Request for Waiver and Leave to Amend FCC Form 175 in Auction No. 58

Dear Mr. Richards:

This letter memorializes our telephone conversation of December 28, 2004 and the basis for our decision regarding the request you submitted dated December 8, 2004, on behalf of Cleartone Corp. ("Cleartone").¹ Cleartone wishes to change the licenses that it selected on its short-form application (FCC Form 175) to participate Auction No. 58 and, therefore, requests a waiver of Section 1.2105(b)(2) of the Commission rules, which prohibits applicants from making major modifications to the short-form application, including modifying their license selection, after the initial filing deadline.² As I informed you in our conversation, we denied Cleartone's waiver request.

Cleartone submitted its short-form application on November 30, 2004, the final day of the filing window for Auction No. 58.³ In its application, Cleartone selected only one broadband Personal Communications Service license of the 242 licenses being offered in Auction No. 58, the 30 megahertz A block license covering the American Samoa Major Trading Area ("MTA"). On December 8, 2004, Cleartone filed its waiver request in which it states that it did not intend to select the A block license and asks to be permitted to change its license selection to be able to bid on the 10 megahertz C5 and F block licenses covering the American Samoa Basic Trading Area ("BTA").

In support of its waiver request, Cleartone explains that it selected the American Samoa A block MTA license rather than the two BTA licenses "because of confusion regarding the display format of the FCC auction software."⁴ Cleartone states that it assumed that the C5 and F blocks had been selected "because the display format of the FCC auction software indicated that the license Cleartone selected was in the American Samoa geographic market."⁵ Only after the application had been submitted and the

¹ Request for Waiver and Leave to Amend – Expedited Action Requested, filed by Glenn S. Richards and Tony Lin, Counsel for Cleartone Corp. on December 8, 2004 ("Waiver Request").

² 47 C.F.R. § 1.2105(b)(2).

³ Broadband PCS Spectrum Auction Start Date Rescheduled for January 26, 2005; New Pre-Auction Dates and Deadlines Established for Auction No. 58, *Public Notice*, 19 FCC Rcd 19945 (WTB 2004) (deadline for filing short-form applications extended to November 30, 2004).

⁴ Waiver Request at 1.

⁵ *Id.* at 2.

deadline had passed did Cleartone recognize that it had made what it characterizes as “an erroneous assumption” about the license selection.⁶ Cleartone asserts that its submission of an exhibit seeking qualification for a “very small business” bidding credit shows that it intended to bid on the C5 and F block licenses because bidding credits are not available for A block broadband PCS licenses.⁷ Cleartone argues that waiver should be granted because the Commission has granted similar waiver requests in the past and that no other auction participant would be prejudiced by grant of waiver in this case.⁸ Moreover, Cleartone contends that the American Samoa market has been auctioned “on several occasions” but “the licensees repeatedly have not been able to develop the authorizations.”⁹ Cleartone also suggests that it lacks the financial resources to bid on the A block license.¹⁰

Section 1.2105(b)(2) of the Commission’s rules states that major amendments cannot be made to a short-form application after the initial filing deadline and specifically includes as major modifications “changes in the license service areas identified on the short-form application on which the applicant intends to bid.”¹¹ In the *Part 1 Third Report and Order*, the Commission considered specifically whether requests to add or delete markets on an applicant’s short-form application would be considered a major or minor amendment.¹² While the Commission recognized that “there may be some circumstances in which the competitiveness of the auction might be enhanced by allowing applicants to add markets to their short-form applications,” it concluded that generally such additional selections should be prohibited as major modifications to a short-form application.¹³ Moreover, the *Auction No. 58 Procedures Public Notice* explicitly warns potential bidders that, after the short form application deadline, applicants “will not be permitted to make major modification to their applications (e.g., *change their license selection*, change the certifying official, change control of the applicant, or change bidding credits).”¹⁴

The Wireless Telecommunications Bureau has consistently interpreted Section 1.2105(b)(2) to prohibit applicants from adding markets to their short form applications after the initial application deadline

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 2-3.

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ 47 C.F.R. § 1.2105(b)(2).

¹² See Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures; Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use; 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 412-16 ¶¶ 63-70 (1997) (*Part 1 Third Report and Order*).

¹³ *Id.* at 414-15.

¹⁴ Broadband PCS Spectrum Auction Scheduled for January 12, 2005, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures, *Public Notice*, 19 FCC Rcd 18190, 18209 (WTB 2004) (*Auction No. 58 Procedures Public Notice*) (emphasis added).

unless a waiver of the rules is warranted.¹⁵ Pursuant to Section 1.925(b)(3) of its rules, a rule waiver is warranted if: (i) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the specific situation, application of the rule would be inequitable, unduly burdensome or contrary to the public interest or the entity requesting the waiver has no reasonable alternative.¹⁶

On the basis of the record before us, we are not persuaded that Cleartone's request satisfies the standard for waiver of the Commission's rules. The Bureau sets the deadline for the submission of short-form applications pursuant to Section 1.2105 of the Commission's rules.¹⁷ Section 1.2105(a)(2) sets out a list of requirements for inclusion in a short-form application.¹⁸ The first listed requirement is that the application must identify the licenses upon which the applicant wishes to bid.¹⁹ The underlying purpose of Section 1.2105 is to establish a fixed date by which all applicants interested in participating in the auction must submit relevant information necessary to establish applicants' qualifications to participate in an auction.²⁰ Among other things, using a fixed date also provides the Commission with sufficient time to review applications prior to the auction and identifies the pool of potential bidders.²¹ In addition, the Commission has also expressed concern that allowing bidders to change their license selections after the short-form filing deadline may result in anti-competitive conduct that would undermine the integrity of its spectrum auctions.²² You have not shown that enforcing the deadline in this case would frustrate these

¹⁵ See, e.g., Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Mr. John Prendergast, counsel for Landmark Site Development, LLC, dated Mar. 30, 2000, 15 FCC Rcd 5721, 5722 (WTB-Auc. Div. 2000) (*Landmark Letter*); Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Mr. John Prendergast, counsel for Townes Telecommunications, Inc., North Dakota Network Corp., and PVT Networks, 15 FCC Rcd 10055, 10057 (WTB-Auc. Div. 2000) (*Townes Letter*); Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Ms. Melodie A. Virtue, counsel for Pass Word, Inc., dated Feb. 14, 2000, 15 FCC Rcd 2824, 2829 (*Pass Word Letter*), recon. affirmed, *Memorandum Opinion and Order*, 15 FCC Rcd 5567 (WTB-Auc. Div. 2000). See also Auction No. 44 Revised Schedule, License Inventory, and Procedures, *Public Notice*, DA 02-1491; Petition for Reconsideration by Spectrum Holdings I, LP, 17 FCC Rcd 14498, 14504 (WTB 2002) (Bureau affirms the waiver standard is satisfied because of intervening unanticipated changes in the auction required by the Auction Reform Act, and therefore, qualified bidders may select additional licenses).

¹⁶ 47 C.F.R. § 1.925(b)(3). Additionally, the Commission may grant a waiver upon a showing of good cause. See 47 C.F.R. § 1.3.

¹⁷ 47 C.F.R. § 1.2105(a)(1).

¹⁸ 47 C.F.R. § 1.2105(a)(2).

¹⁹ 47 C.F.R. § 1.2105(a)(2)(i).

²⁰ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 92-253, *Second Report and Order*, 9 FCC Rcd 2348, 2375-77 (1994).

²¹ See Letter from Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to F. Scott Fistel, counsel for Ideas for Business, Inc., 19 FCC Rcd 20517-20518-19 (WTB-Auc. Div. 2004).

²² See *Part 1 Third Report and Order*, 13 FCC Rcd at 414-15.

purposes, or would not serve them. The Commission's rules are best served by applying auction deadlines in a fair and consistent manner.

Clearstone's admitted "erroneous assumption" is neither unique nor unusual. As indicated above, the Commission has previously held, and the *Auction No. 58 Procedures Public Notice* clearly stated, that changes to license selections are impermissible major modifications.²³ Thus, potential applicants were on notice that license selection must occur prior to the short-form deadline. Clearstone cites cases in its waiver request in which applicants in previous auctions have been permitted to change their license selections.²⁴ Those cases, however, are distinguishable from the current case because in each of those cases we found that the Commission's software may have contributed to the applicants' confusion.²⁵ In this case, beyond making a generalized assertion of software-caused confusion, Clearstone has not explained how the software contributed to its confusion. In fact, we note that the FCC software used for short-form applications in Auction No. 58 has been updated to clearly indicate the market, frequency block, license frequency size, and market type (i.e., BTA or MTA) of the licenses that an applicant may select.²⁶ The type of potential confusion relied upon in the Division's earlier decisions is not present in Clearstone's case.²⁷

The Commission has stressed that applicants must exercise reasonable diligence in preparing their short-form applications.²⁸ We believe that Clearstone failed to exercise reasonable diligence by verifying its license selection, as listed on its application, either before officially submitting the application or after submitting the application but before the final deadline. Moreover, we do not find that grant of waiver in this case to be in the public interest nor would the underlying purpose of the rule be frustrated by its application in this case.

²³ *Auction No. 58 Procedures Public Notice* at 18209.

²⁴ Waiver Request at 2.

²⁵ Specifically, the applicants claimed that they thought they had selected all frequency blocks (frequency blocks A through N) for the market they chose, yet, unless the applicant indicated otherwise, the FCC auction software automatically defaulted to selecting only the A block. In the decisions granting waiver, the Division noted that "the software selection formation and instruction mechanisms for 2,450 licenses . . . were complex and may have contributed to [the applicants'] misunderstanding." *Landmark Letter*, 15 FCC Rcd at 5722; *Townes Letter*, 15 FCC Rcd at 10057.

²⁶ The FCC Form 175 software lists all the available licenses and includes the license block size of 30 megahertz (i.e., an A block license) and the license number (i.e., "CW-MTA051-A") which, when compared to other licenses listed on the page, clearly indicates that it is for the A block and that the license is for an MTA not a BTA.

²⁷ Moreover, in the cases that were cited in Clearstone's waiver request, the applicants had 2,450 licenses from which to choose. See *Landmark Letter* at 5722; *Townes Letter* at 10057. Auction No. 58 applicants, on the other hand, had only 242 licenses from which to choose. Thus, the likelihood of confusion is much smaller in Clearstone's case. See also *Pass Word Letter* at 2825 ("the labeling of the 2,499 Paging licenses was complex and may have contributed to [the applicant's] misunderstanding."). Moreover, Clearstone's action of picking one (MTA) license appears to contradict its claim that it intended to bid on two (BTA) licenses.

²⁸ See, e.g., Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Mr. David E. Beyerle, 15 FCC Rcd 6220 (WTB-Auc. Div. 2000), recon. affirmed, 15 FCC Rcd 7825 (WTB-Auc. Div. 2000).

Accordingly, Cleartone's request for waiver of Section 1.2105(b)(2) in Auction No. 58 is denied. This action is taken pursuant to authority delegated pursuant to Section 0.331 of the Commission's rules.²⁹

Sincerely,

William W. Huber
Associate Chief
Auctions and Spectrum Access Division
Wireless Telecommunications Bureau

²⁹ 47 C.F.R. § 0.331.