

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

In the Matter of)	
)	
MARITIME COMMUNICATIONS/ LAND MOBILE LLC)	File No. 0002303355
)	
Application for New Automated Maritime Telecommunications System Stations)	
)	
Request for Waiver of Section 1.2110(c)(5)(A) of the Commission's Rules)	

ORDER

Adopted: November 27, 2006

Released: November 27, 2006

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* On September 7, 2005, Maritime Communications/Land Mobile, LLC (MC/LM or Applicant) filed the captioned application (Application) for new Automated Maritime Telecommunications System (AMTS) licenses for which it was the winning bidder in FCC Auction No. 61.¹ In the Application, MC/LM claims eligibility for a 35 percent bidding credit as a very small business, in support of which it provided gross revenue data for three disclosable interest holders.² At staff request, MC/LM amended the Application on August 21, 2006, to add revenue data for Donald R. DePriest (Mr. DePriest), the husband of Sandra M. DePriest (Mrs. DePriest), Officer, Director, and holder of a 100 percent indirect ownership interest in MC/LM.³ If Mr. DePriest's gross revenues are attributed to MC/LM, the Applicant concedes, MC/LM would be entitled only to a reduced bidding credit of 25 percent as a small, but not very small, business.⁴ MC/LM contends, however, that the "spousal attribution" rule pertaining to designated entity showings, Section 1.2110(c)(5)(iii)(A) of the

¹ See FCC File No. 0002303355, filed Sept. 7, 2005 (Application), as amended Aug. 21, 2006 (Amended Application).

² See Disclosable Interest Holders exhibit to Application. The listed disclosable interest holders were Communications Investments, Inc., Sandra M. DePriest (Mrs. DePriest), and S/RJW Partnership, L.P. The only gross revenues attributed to MC/LM were those of Mrs. DePriest, who had reported average gross revenues for the past three years of \$398,156.67.

³ See Attachment to Amended Application. MC/LM has repeatedly represented that Mrs. DePriest has held 100 percent control of MC/LM at all relevant times. See, e.g., *id.* at 1; Maritime Communications/Land Mobile, LLC and Paging Systems, Inc., *Order*, 21 FCC Rcd 8794, 8797-98 ¶ 7 n.38 (WTB PSCID 2006) (*August 2006 Order*) (citing MC/LM's representation in an opposition pleading that, "[a]t all times from the filing of MC/LM's Form 175 application to the date of the filing of the instant opposition, Sandra M. DePriest has held one hundred percent control of MC/LM"). The *August 2006 Order* was adopted by the Public Safety and Critical Infrastructure Division (PSCID) of the Wireless Telecommunications Bureau (Bureau). Pursuant to a Commission reorganization effective September 25, 2006, the relevant duties of PSCID were assumed by the Bureau's Mobility Division. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, FCC 06-35 (rel. Sept. 25, 2006).

⁴ See Attachment to Amended Application at 1. According to the Attachment to the Amended Application, Mr. DePriest controls American Nonwovens Corporation (ANC), which had average gross revenues for the past three years of \$9,838,403. *Id.*

Commission's Rules,⁵ should not apply here because Mr. DePriest has no ownership interest in, and is neither an officer nor a director of, the Applicant, and he and Mrs. DePriest "live separate economic lives."⁶ Although MC/LM thus believes that no waiver of Section 1.2110(c)(5)(iii)(A) is required in this case, it requests such a waiver "in an abundance of caution," in case the Commission were to conclude differently.⁷ For the reasons that follow, we conclude that Section 1.2110(c)(5)(iii)(A) of the Commission's Rules requires the attribution of Mr. DePriest's revenues to MC/LM for purposes of determining its designated entity status. We further conclude that MC/LM has not demonstrated a basis for waiving that rule here. We find, therefore, that MC/LM is entitled only to a 25 percent bidding credit as a small business.⁸

2. *Background.* In 1981, the Commission designated spectrum for AMTS operations at the request of tug, towboat, and barge operators, who had complained that the existing ship-shore communications service was not adequate to meet their needs.⁹ The Commission has designated two spectrum channel blocks for AMTS operations.¹⁰ In 2002, the Commission adopted a geographic licensing approach for AMTS stations and, pursuant to statutory mandate, was required to use competitive bidding to resolve mutually exclusive applications.¹¹ On August 17, 2005, the Commission completed the auction of ten AMTS licenses in Auction No. 61.¹² MC/LM was the winning bidder for the Block A

⁵ 47 C.F.R. § 1.2110(c)(5)(iii)(A). Although MC/LM refers to this rule as the "spousal attribution rule," the rule itself uses the term "spousal affiliation."

⁶ See Attachment to Amended Application at 1.

⁷ *Id.* at 1-2.

⁸ MC/LM also submitted a letter to the Bureau on May 25, 2006, requesting that the Bureau complete the processing of long-form applications filed by winning bidders in Auction No. 61. Letter from John Reardon, President Maritime Communications/Land Mobile, LLC to Catherine W. Seidel, Acting Bureau Chief, Wireless Telecommunications Bureau (May 25, 2006). With the release of this Order, the Bureau is prepared to process MC/LM's application, FCC File No. 0002303355.

⁹ See Amendment of Parts 2, 81 and 83 of the Commission's Rules to Allocate Spectrum for an Automated Inland Waterways Communications System (IWCS) along the Mississippi River and Connecting Waterways, GEN Docket No. 80-1, 84 F.C.C. 2d 875, 876 ¶ 2 (1981), *on recon.*, *Memorandum Opinion and Order*, 88 F.C.C. 2d 678 (1982), *aff'd sub nom. WJG Tel. Co. v. FCC*, 675 F.2d 386 (D.C. Cir. 1982). The Commission originally allocated spectrum for AMTS use on the Mississippi River, then expanded the authorized service area to the Gulf Intracoastal Waterway in 1982, the Gulf of Mexico in 1984, and nationwide in 1991. See Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), *First Report and Order*, GEN Docket No. 88-372, 6 FCC Rcd 437 (1991); Amendment of Parts 2, 81 and 83 of the Rules to Add the Gulf of Mexico to the Authorized Service Areas of Maritime Mobile Systems Operating in the 216-220 MHz Band, *Report and Order*, GEN Docket No. 84-18, 56 Rad. Reg. 2d (P & F) 1613 (1984); Amendment of Parts 2, 81 and 83 of the Rules to Add the Gulf Intracoastal Waterway to the Authorized Service Area of Inland Waterways Communications Systems, *Report and Order*, GEN Docket No. 81-822, 51 Rad. Reg. 2d (P & F) 440 (1982). In 1997, the Commission adopted rules to permit AMTS stations to provide commercial service to units on land, as well as to maritime vessels. See Amendment of the Commission's Rules Concerning Maritime Communications, *Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 12 FCC Rcd 16949, 16965 ¶ 24 (1997); 47 C.F.R. § 80.123.

¹⁰ AMTS Channel Blocks A (217.5-218/219.5-220 MHz) and B (217-217.5/219-219.5 MHz). See 47 C.F.R. § 80.385(a)(2).

¹¹ See Amendment of the Commission's Rules Concerning Maritime Communications, *Second Memorandum Opinion and Order and Fifth Report and Order*, PR Docket No. 92-257, 17 FCC Rcd 6685, 6686-87, 6695, 6718 ¶¶ 2, 21, 79 (2002); 47 U.S.C. § 309(j)(1).

¹² See Auction of Automated Maritime Telecommunications System Licenses Closes: Winning Bidders Announced for Auction No. 61, *Public Notice*, 20 FCC Rcd 13747 (WTB 2005) (*Auction Closing PN*). The licenses available in Auction No. 61 were those for which there was no winning bidder in the first AMTS auction, Auction No. 57, which

(continued...)

licenses covering the Mid-Atlantic, Mississippi River, Great Lakes, and Southern Pacific regions.¹³ MC/LM timely submitted its down payment and long-form application, and on October 31, 2005, the Wireless Telecommunications Bureau issued a Public Notice announcing that MC/LM's long-form application had been accepted for filing.¹⁴

3. In Auction No. 61, a winning bidder that qualified as a very small business was entitled to claim a bidding credit of 35 percent, and a winning bidder that qualified as a small business was entitled to claim a bidding credit of 25 percent.¹⁵ A "very small business" is defined as an entity with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years, and a small business is defined as an entity with attributed average annual gross revenues of more than \$3 million but less than \$15 million for the preceding three years.¹⁶ Section 1.2110(c)(5)(iii)(A) of the Commission's Rules provides in relevant part that, for purposes of determining the affiliates of an applicant claiming designated entity status, "[b]oth spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States."¹⁷

4. As noted, MC/LM claims eligibility for a 35 percent bidding credit as a very small business, but concedes that, if Mr. DePriest is deemed an "affiliate" of MC/LM, the attribution to MC/LM of his average gross revenues would render MC/LM eligible for only a 25 percent bidding credit as a small business.¹⁸ MC/LM argues that such attribution is not required or warranted under Section 1.2110(c)(5)(iii)(A), because Mr. DePriest has no ownership interest or position in MC/LM, and Mr. and Mrs. DePriest "have their own, separate sources of revenue."¹⁹ Under these circumstances, MC/LM contends, "the presumption of spousal affiliation ... is rebutted..."²⁰ In the event that the Commission disagrees, concluding that Mr. DePriest's revenues are attributable to MC/LM under Section 1.2110(c)(5)(iii)(A), MC/LM requests a waiver of that rule.²¹ MC/LM argues that unique circumstances exist which make it "unreasonable" to apply the spousal affiliation rule to MC/LM, again pointing to the financial and professional independence of the DePriests.²² MC/LM adds that, given the "separate character of [the DePriests'] economic lives and their independent, substantial contributions to society," the underlying purpose of the rule, which MC/LM says is "to prevent the award of bidding credits to persons or entities who are not entitled to them," would not be served by applying the rule in this

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closed on September 15, 2004. See Auction of Automated Maritime Telecommunications System Licenses Scheduled for August 3, 2005, *Public Notice*, 20 FCC Rcd 7811, 7816 (WTB 2005) (*Procedures PN*).

¹³ See *Auction Closing PN*, 20 FCC Rcd at 13755.

¹⁴ See Wireless Telecommunications Bureau Announces that Applications for Automated Maritime Telecommunications System Licenses Are Accepted for Filing, *Public Notice*, 20 FCC Rcd 17066 (WTB 2005).

¹⁵ See 47 C.F.R. §§ 1.2110(f)(2)(i)-(ii), 80.1252.

¹⁶ 47 C.F.R. § 80.1252. See *Procedures PN*, 20 FCC Rcd at 7828-29.

¹⁷ 47 C.F.R. § 1.2110(c)(5)(iii)(A).

¹⁸ See Attachment to Amended Application at 1.

¹⁹ *Id.* MC/LM also represents that Mrs. DePriest "was, at one time, an officer of ANC and did some work for that company more than ten years ago," but has had no relationship with ANC since then. *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1-2. MC/LM represents, *inter alia*, that "Sandra has a well established professional and clerical life of her own and is fully capable of operating MC/LM without contribution by or interference from Don." *Id.*

instance.²³ Finally, MC/LM also asserts that the public interest would be served by providing the larger 35 percent bidding credit to a woman-owned business.²⁴

5. *Discussion.* We conclude that Section 1.2110(c)(5)(iii)(A) of the Commission's Rules clearly requires that the revenues of Mr. DePriest, including those stemming from his ownership and control of ANC, be attributed to MC/LM.²⁵ Although MC/LM claims that it has made a sufficient showing to rebut application of the spousal affiliation rule, this argument fails for the simple reason that the rule does not establish a presumption of spousal affiliation that is subject to rebuttal, but rather a hard and fast requirement that spouses be deemed affiliates unless they are legally separated.²⁶ The spousal

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ The instant Order addresses only the issue of whether the revenues of Mr. DePriest are properly attributable to MC/LM. We therefore dismiss as an unauthorized pleading a "Request to Place on Public Notice, Request for Leave to Supplement, and Request to Dismiss" (Request) filed on September 12, 2006, by Warren C. Havens (Havens), acting individually and as the president of entities that filed competing applications in Auction No. 61. *See, e.g.*, 47 C.F.R. § 1.45; Kim Shaw Wong, *Memorandum Opinion and Order*, 11 FCC Rcd 11928, 11930 ¶ 7 (1996). The Bureau previously addressed a petition to deny filed by Havens (and the Havens-controlled entities) against the Application, in which he contends, *inter alia*, that MC/LM should be disqualified to hold these licenses based on alleged real-party-in-interest violations, misrepresentations to the Commission, and other transgressions. *See August 2006 Order*, n.3, *supra*. Havens has filed a petition for reconsideration of the *August 2006 Order*, and our action herein is without prejudice to resolution of the issues raised in that petition for reconsideration. There is no need or reason to consider those same issues here. Havens is incorrect in contending that the amendment to the Application is a major amendment, requiring that it be placed on public notice. *See Request* at 3. Neither Section 1.2105(b) of the Rules, 47 C.F.R. § 1.2105(b), which expressly pertains only to short-form applications and to "certifications required by this section," nor Section 1.929(a)(2), 47 C.F.R. § 1.929(a)(2), classifies MC/LM's amendment as a major amendment. Section 1.929(a)(2) treats as major any amendment reflecting a "substantial change in ownership or control" of an applicant, but MC/LM does not represent that any such substantial change of ownership has occurred, and, as discussed below, our determination that Mr. DePriest's revenues must be attributed to MC/LM due to the spousal affiliation rule is not based on a finding that he exercised actual ownership or control. In addition, the Commission previously ruled that a post-auction amendment that *decreases* an applicant's bidding credit, as here, is a minor amendment, and a federal court of appeals upheld that ruling. *See Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155, 162-63 (D.C. Cir. 2003), *reh'g and reh'g en banc denied*, April 10, 2003, *cert. denied*, 540 U.S. 981, 124 S.Ct. 463, 157 L.Ed.2d 371 (2003). In any event, given that we determine that MC/LM is eligible only for the 25 percent bidding credit, the less favorable to MC/LM of the two possible outcomes under consideration here, we fail to see how this decision harms Havens in any way. *See id.* at 162-63 (stating that the Court, like the Commission, does not see how other bidders are prejudiced, or the integrity of the auction process adversely affected, by a bidder's mistaken assumption that it was entitled to a greater bidding credit than it ultimately is accorded).

²⁶ The kinship affiliation rule, 47 C.F.R. § 1.2110(c)(5)(iii)(B), which applies to specified immediate family members of an applicant, does provide for a rebuttable presumption of affiliation, but that rule is not at issue in this case. In adopting the kinship affiliation rule, the Commission incorporated the definition of "immediate family member" in the Small Business Administration's rules, 13 CFR § 124.100 (1994), which included, among others, husbands and wives, step-parents, step-children, half-siblings, and in-laws. However, the more specific spousal affiliation rule requires that spouses be deemed affiliates with the sole exception of when the spouses are legally separated. MC/LM does not argue, and we discern no basis for finding, that application of the narrowly focused spousal affiliation rule can be supplanted in this case by application of the kinship affiliation rule. In adopting these rules, the Commission made clear that it intended that a more rigorous standard apply to spouses than to other family members. *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245, 7262 ¶ 102 (1994) ("Because we believe kinship relationships in many cases do not present the same potential for abuse that exists with spousal relationships, particularly in terms of the 'identity of interest' that are likely to exist between the persons involved, we shall adopt a more relaxed standard for determining when kinship interests must be attributed to applicants").

affiliation rule establishes what the Commission termed “a workable bright-line standard,”²⁷ based on the relevant Small Business Administration regulations, and is intended to obviate the need for case-by-case determinations as to whether a particular applicant’s spouse should be deemed an affiliate, and his or her revenues attributed to the applicant.²⁸ Rather than entertain individualized demonstrations of spousal independence, such as the “rebuttal” showing offered here by MC/LM, the Commission determined that “we will in every instance attribute the financial interests of an applicant’s spouse to the applicant,”²⁹ except in cases of legal separation recognized by a court of competent jurisdiction.³⁰ The Commission recognized that this approach could lead in some cases to “harsh results,” but concluded that this consideration was outweighed by the benefits of a bright-line rule in terms of clarity and certainty.³¹ We thus conclude that the spousal affiliation rule does apply to MC/LM, notwithstanding its claims regarding Mrs. DePriest’s financial independence from Mr. DePriest and her exercise of sole control over MC/LM. Accordingly, absent a waiver, Mr. DePriest’s revenues must be attributed to MC/LM for purposes of determining its designated entity status.

6. Section 1.925 of the Commission’s Rules provides that we may grant a waiver if it is shown that (a) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest; or (b) in light of unique or unusual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.³² Based on the record before us, we conclude that the waiver request should be denied.

7. With respect to the first prong of the waiver standard, MC/LM argues that the purpose of the spousal affiliation rule is “to prevent the award of bidding credits to persons or entities who are not entitled to them,” and that this regulatory purpose would not be undermined if we do not attribute Mr. DePriest’s revenues to MC/LM.³³ We disagree. The premise of this argument is that MC/LM should receive a 35 percent bidding credit, irrespective of the revenues of Mr. DePriest, because the latter has no interest in or control of MC/LM, and leads what MC/LM terms an “independent economic life” from that of his wife, MC/LM’s real-party-in-interest. As discussed above, however, the spousal affiliation rule is based on precisely the opposite premise: that, except in cases of legal separation, determining an applicant’s entitlement to a particular designated entity status should *always* take into account the spouse’s revenues. Given that the Commission adopted this bright-line rule with a clear understanding that it might result in attributing to an applicant spousal revenues that are not actually available to the applicant, but nonetheless determined that such a rule would serve the public interest as an administratively efficient safeguard against “gaming” the system, we are not persuaded that the purpose of the rule is undermined whenever it is applied to require attribution of the revenues of a spouse who may not in fact provide financial support or otherwise play a role in the applicant’s operations.

8. For the same reason, we are not persuaded that spousal independence such as is claimed here should be deemed a unique or unusual circumstance warranting grant of a waiver under the second prong of the Section 1.925(b)(3) standard. Again, the fact that the Commission specifically contemplated

²⁷ *Id.* at 7262 ¶ 101.

²⁸ *Id.* at ¶¶ 99-101.

²⁹ *Id.* at ¶ 100.

³⁰ *Id.* at ¶ 101.

³¹ *Id.*

³² 47 C.F.R. § 1.925(b)(3); *see also* *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

³³ *See* Attachment to Amended Application at 2.

that the rule would require attribution of a spouse's revenues even with respect to those applicants who might be able to demonstrate that they would receive no benefit from those revenues precludes a finding that such spousal independence is the type of unusual or unique circumstance that justifies a waiver of the rule. Far from being unique or unusual, situations such as the one presented here were expressly foreseen when the Commission adopted the spousal affiliation rule. To grant MC/LM a waiver of the spousal affiliation rule on the basis of this showing would no doubt spur a considerable number of similar requests, and require the kind of case-by-case review of showings of spousal independence that the Commission intended to avoid through application of a bright-line rule. We conclude, therefore, that MC/LM has not shown that it is deserving of waiver relief under either prong of the Section 1.925(b)(3) waiver standard.³⁴

9. *Conclusion.* Under Section 1.2110(c)(5)(iii)(A) of the Commission's Rules, MC/LM must include the revenues of Donald R. DePriest in calculating its eligibility for a bidding credit as a designated entity. The record does not provide a basis for granting MC/LM a waiver of the rule under either prong of the Section 1.925 waiver standard. Accordingly, MC/LM must be classified as a small business, rather than a very small business, for purposes of Auction No. 61, and is therefore entitled only to a bidding credit of 25 percent.

10. For the aforementioned reasons, IT IS ORDERED that application FCC File No. 0002303355, filed on September 7, 2005, as amended August 21, 2006, SHALL BE PROCESSED consistent with this Order and the Commission's Rules.

11. IT IS FURTHER ORDERED that, pursuant to Sections 1.2109, 1.2110 and 80.1252 of the Commission's Rules, 47 C.F.R. §§ 1.2109, 1.2110, 80.1252, Maritime Communications/Land Mobile, LLC must submit a payment to cover the difference between the total payments Maritime Communications/Land Mobile, LLC has submitted to the Commission, which equal the net winning bid amount as calculated with a very small business bidding credit, and the net winning bid amount as calculated with a small business bidding credit within ten (10) business days of the release of this Order or, if it fails to pay this balance within ten (10) business days of the release of this Order, it may pay the remaining balance within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due.

12. IT IS FURTHER ORDERED that, pursuant to Sections 1.3 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.3, 1.925, the Request for Waiver filed by Maritime Communications/Land Mobile, LLC on August 21, 2006, IS DENIED.

13. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45, the

³⁴ We need not address at length MC/LM's argument that the public interest would be served by grant of a waiver because MC/LM is a woman-owned business. Under both prongs of the Section 1.925 waiver standard, a finding that the waiver would serve the public interest is not by itself sufficient to support a waiver. There must be an additional finding – either a finding that the purpose of the rule would not be served or would be frustrated, under the first prong, or a finding of unique or unusual circumstances, under the second prong – in order to support a waiver, and as we discuss *supra*, we are unable to make either finding here. Moreover, even under a more generalized good cause waiver standard, *e.g.*, 47 C.F.R. § 1.3, we are not persuaded that a waiver should be granted simply because the requester is a woman-owned business. *Cf.* Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, GEN Docket No. 90-314 & ET Docket No. 92-100, 15 FCC Rcd 10456, 10475 ¶ 37 (2000) (declining to apply gender-based designated entity provisions in light of the Supreme Court's *Adarand* decision, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)).

Request to Place on Public Notice, Request for Leave to Supplement, and Request to Dismiss filed by Warren C. Havens on September 12, 2006, IS DISMISSED.

14. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45, the Opposition to Request to Place on Public Notice, Request for Leave to Supplement, and Request to Dismiss filed by Maritime Communications/Land Mobile, LLC on September 26, 2006, IS DISMISSED AS MOOT.

15. 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

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau