



Federal Communications Commission
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UNREDACTED

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Re: Spectrum Acquisitions, Inc. Application to Participate in Auction 73 –
Request for Waiver of Upfront Payment Deadline; Redacted Version Released
January 23, 2008, as DA 08-147

Dear Mr. O'Neil:

This letter responds to your request made on behalf of Spectrum Acquisitions, Inc. ("SAI") on January 17, 2008, to waive the upfront payment deadline in the Commission's upcoming auction of 700 MHz Band licenses (Auction 73).¹ SAI also concurrently seeks confidential treatment for its Waiver Request because it discusses SAI's bidding information, the disclosure of which would violate the Commission's procedures for anonymous bidding in Auction 73 and the anti-collusion rule. SAI's Waiver Request will be accorded confidential treatment in accordance with our rules and procedures. Accordingly, this letter will not be publicly disclosed in full by the Commission until the Commission discloses all non-public information relating to Auction 73. For the reasons described below, the Waiver Request is denied.

SAI filed a short-form application to participate in Auction 73.² SAI's Application, as initially submitted, was determined to be accepted.³ The deadline for making upfront payments was 6:00 PM on

¹ Request for Waiver of Submission of Upfront Payment submitted by David G. O'Neil on behalf of Spectrum Acquisitions, Inc. to the Chief, Auctions and Industry Analysis Division via the Auction 73 e-mail address on January 17, 2008 ("Waiver Request"). Although SAI's Waiver Request was submitted by email on January 17, 2008, that email was received by the Commission well after the close of business at 8:24 PM. SAI also concurrently seeks confidential treatment for its Waiver Request. See 47 C.F.R. § 0.459.

² See Auction 73 Short-Form Application (FCC Form 175) of SAI, dated December 3, 2007.

³ See "Auction of 700 MHz Band Licenses, Upfront Payment Deadline Rescheduled for January 4, 2008; Mock Auction Rescheduled; Status of Short-Form Applications to Participate in Auction 73," *Public Notice*, DA 07-5030 (rel. Dec. 18, 2007) ("Auction 73/76 Status Public Notice"). SAI was subsequently deemed to be a qualified bidder for Auction 73. See "Auction of 700 MHz Band Licenses; 214 Bidders Qualified to Participate in Auction 73," *Public Notice*, DA 08-83 (rel. Jan. 14, 2007) ("Auction 73/76 Qualified Bidders Public Notice"). It should be noted that two wire transfers were submitted for SAI's upfront payment for Auction 73. See Waiver Request at 3. One wire transfer was received prior to the January 4, 6:00 p.m. ET deadline. Thus, SAI was found qualified to bid with the amount submitted with that timely wire transfer.

Friday January 4, 2008. Pursuant to Section 1.2106(a) of its rules,⁴ on October 5, 2007, the Commission established a deadline of December 28, 2007 for submission of upfront payments by applicants seeking to participate in Auction 73.⁵ That deadline was subsequently extended to January 4, 2008, providing all applicants, including SAI, with additional time to undertake the necessary preparations for the auction and make the required payment.⁶ Section 1.2106(c) provides that if an applicant fails to submit an upfront payment by the announced deadline, it will be ineligible to bid.⁷

In its Waiver Request, SAI describes the problems it encountered when it attempted to wire funds from its account to the Commission's Auction 73 account at Mellon Bank by the January 4 deadline. According to SAI, on Thursday January 3, 2008 at 6:00 pm ET (4:00 pm MT), one of its representatives deposited two cashier's checks to SAI's checking account at a Bank of America Banking Center in Scottsdale, Arizona ("BOA Arizona"). SAI states that, when making the deposit, its representative informed the BOA Arizona's "operations supervisor" that the deposit must be available the next morning for the Bank of America's branch in Richardson, Texas ("BOA Texas") to be able to wire funds to Commission's Mellon Bank account. According to SAI, the BOA Arizona supervisor called the banks that had issued the cashier's checks to verify the availability of funds and consequently made sure no holds were placed on the checks, so funds would be available Friday morning.⁸

SAI claims that the wire transfer to Mellon Bank was initiated in the morning of January 4, but that, at approximately 2:45 pm ET, one of SAI's representatives was notified that BOA Texas had placed a hold on the funds. SAI states that it contacted another bank at 4:30 pm ET to wire additional funds to BOA Texas. According to SAI, BOA Texas received those funds at 4:53 pm ET, at which time SAI "reasonably believed" that BOA Texas would initiate the wire in advance of the 6:00 pm ET deadline. SAI claims that it attempted to confirm the wire transfer several times during the remainder of January 4 and on the morning of January 5, but was unable to reach the BOA Texas branch officer. SAI states that, on January 7, 2008, the banking officer at BOA Texas informed SAI that the wire transfer had not been made on January 4 because he had placed a hold on SAI's bank account. According to SAI, the BOA Texas banking officer removed the hold on the morning of January 7 and wired the money, which, SAI claims, was accepted by the Commission on January 7, 2008.⁹ SAI submitted the instant Waiver Request on January 17, 2008, nearly two weeks after the upfront payment deadline.

In light of the public interest in predictable and consistent application of Commission rules and procedures, we deny SAI's Waiver Request. Pursuant to Section 1.925, the Commission may grant a

⁴ See 47 C.F.R. §1.2106(a).

⁵ Auction of 700 MHz Band Licenses Scheduled for January 24, 2008; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 73 and 76, *Public Notice*, 22 FCC Rcd 18,141 ("Auction 73/76 Procedures Public Notice").

⁶ Auction of 700 MHz Band Licenses; Upfront Payment Deadline Rescheduled For January 4, 2008; Mock Auction Rescheduled; Status Of Short-Form Applications to Participate in Auction 73, *Public Notice*, DA 07-5030 (rel. Dec 18, 2007) ("Auction 73 Status Public Notice").

⁷ See 47 C.F.R. § 1.2106(c).

⁸ Waiver Request at 2-3.

⁹ *Id.* at 3-5.

waiver of its rules if (i) it is shown that the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rules would be inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative.¹⁰ As discussed below, applying the deadline in the instant case serves the relevant rule’s purpose of maintaining the integrity of the auction process and the auction schedule, and the facts presented do not demonstrate that applying the deadline is inequitable or contrary to the public interest, or that SAI had no reasonable alternative by which it could have complied with the rule.

The Commission set the Auction 73 upfront payment deadline as one in a series of pre-auction deadlines established to enable the auction to begin before the statutorily-mandated auction start date of January 28, 2008.¹¹ The amount of an upfront payment determines each applicant’s initial bidding eligibility in the auction.¹² Following the upfront payment deadline, the Commission completes review of applications and announces in advance of the auction the applicants that are qualified to bid.¹³ The upfront payment deadline must be set so as to allow the timely announcement of qualified bidders, both to enable qualified bidders sufficient time to finalize their bidding plans and to provide the Commission with sufficient time to complete preparations for a timely commencement of the auction – in this case, before January 28, 2008, as mandated by statute.

SAI asserts that it performed “extraordinary due diligence” to ensure timely submission of its upfront payment, and that, but for actions by a bank employee, contrary to the bank’s policy and its own instructions, the wire was not made until January 7. In support of its assertion that it performed extraordinary due diligence, SAI states that it “confirmed sufficient funds were in its Bank of America account prior to directing the bank to initiate the wire transfer, discussed with the bank the process for the wire transfer, and received assurances from the bank on two separate occasions that the wire transfer would be made in a timely manner on January 4.”¹⁴

SAI’s actions on January 3 and 4 fail to demonstrate even ordinary due diligence. The Commission has repeatedly stated that applicants should make arrangements with their bank well in advance of the deadline, and leave sufficient time to avoid any problems.¹⁵ Yet, it would appear that SAI attempted to make the upfront payment through a multi-step process involving the deposit of two cashier’s checks at one Bank of America branch the day before the deadline, in order to then wire the funds out of another Bank of America branch in a different state. More specifically, according to SAI, it

¹⁰ 47 C.F.R. § 1.925.

¹¹ See *Auction 73/76 Procedures Public Notice*, 22 FCC Rcd 18,141 at ¶ 10; see also 47 U.S.C. § 309(j)(15)(v).

¹² See *Auction 73/76 Procedures Public Notice*, 22 FCC Rcd 18,141, 18,175-76 at ¶¶ 122-125

¹³ *Id.*, 22 FCC Rcd at 18,178 ¶ 130.

¹⁴ Waiver Request at 5.

¹⁵ “The Bureau reminds applicants that they should discuss arrangements (including transfer times and bank closing schedules) with their financial institution several days before making the wire transfer so as to avoid untimely upfront payments. Be sure to allow sufficient time for the transfer to be initiated and completed before the deadline.” *Auction 73 Status Public Notice* at ¶ 10. See also *Auction 73/76 Procedures Public Notice*, 22 FCC Rcd at 18,173 at ¶ 116.

attempted to fund the account from which it planned to make the wire transfer to the Commission's account a mere twenty-four hours before the deadline (i.e., 6:00 p.m. ET on January 3), and it did so using two cashier's checks. SAI states that it requested, and believed, that the hold that attached to the cashier's checks would be lifted for it in order to make the wire transfer the following day. By using multiple transactions in its attempt to submit payment, SAI assumed the risk that problems could arise in connection with any of the transactions. Moreover, according to facts presented by SAI itself, it did not follow-up its request – with either branch officer – until it was notified, in the afternoon on the day of the deadline, by the bank that a hold had been placed on the funds. Such actions indicate something well short of due diligence.

SAI argues that its actions are similar to those in which the Commission has waived the upfront payment deadline. SAI likens its circumstances to *Charytan/MetroPCS* in which the Commission waived an upfront payment deadline because applicant had demonstrated due diligence to overcome any error in the submission of its upfront payment through its attentiveness to the payment process.¹⁶ SAI also asserts that its facts are similar to *Leibman* and *Hayes-Bell* because its situation also involves “administrative errors outside the applicant's control that were resolved expeditiously and without prejudice to other bidders.”¹⁷

The Commission has waived the upfront payment deadline for certain applicants, but only in extremely limited circumstances not present here.¹⁸ In each of the cases cited by SAI, the applicants provided evidence that they had initiated the payment process well in advance of deadline.¹⁹ As noted above, SAI attempted to fund the account that would wire transfer those funds to Mellon Bank using two cashier's checks twenty-four hours before the deadline. SAI provides no evidence that it made arrangements with the Bank of America prior to the day before the deadline to ensure the multiple layered transaction would go through without any problems. Reasonable diligence would include leaving additional time when the transaction involves multiple funds transfers instead of one transfer and requires a departure from the bank's practice (i.e., of placing a hold cashier's checks), which even if not always required was routinely within the bank's discretion. As the instant facts demonstrate, applicants should

¹⁶ Waiver Request at 6-7. See Letter to Ms. Lynn R. Charytan from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 00-2760, 15 FCC Rcd 24,540 (2000) (granting waiver request where bank employee's last minute action prior to deadline interfered with submission of a portion of upfront payment, notwithstanding repeated efforts by applicant to effect submission) (“*Charytan/MetroPCS*”).

¹⁷ Waiver Request at 7. See Letter to Sara F. Leibman, Esq., from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 03-1581, 18 FCC Rcd 9721 (2003) (granting waiver request where notwithstanding efforts by applicant's agent to monitor transfer process, funds submitted prior to the deadline were returned by the Commission's bank shortly before deadline) (“*Liebman*”); Application of Ramona Lee Hayes-Bell for a New FM Construction Permit on Channel 236A at Pahrump, Nevada, DA 00-1537, 15 FCC Rcd 14729 (2000) (“*Hayes-Bell*”).

¹⁸ See, e.g., Letter to Patrick Shannon, Esq. from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 03-1944, 18 FCC Rcd 11,552 (2003) (granting waiver request where applicant made repeated attempts prior to deadline to submit its funds after funds initially were returned, including contacting the Commission prior to deadline to seek guidance).

¹⁹ *Charytan/MetroPCS*, 15 FCC Rcd at 24,542 (applicant had discussed wire transfer arrangements with its bank five days before the planned transaction); *Hayes-Bell*, 15 FCC Rcd at 14,732 ¶ 8 (applicant provided correct wire instructions to bank four days before deadline); *Leibman*, 18 FCC Rcd at 9723 (applicant had deposited funds with its law firm three business days before the deadline).

include all parties (for example, a bank officer in both BOA Arizona and BOA Texas) to any arrangements that appear to depart from the regular practice of requiring sufficient time to verify availability of funds.

Moreover, unlike the cases SAI cites, SAI provides no independent evidence that its bank acknowledges that it (or at least one of its employees) acted improperly or contrary to procedures and was the cause for the untimely wire transfer.²⁰ SAI simply provides a copy of its letter to the bank describing SAI's version of what happened. Moreover, according to SAI's own record, the bank employee, without explanation, twice placed a hold on funds in SAI's account. Thus, it is not clear from what SAI has provided that it had sufficient unencumbered funds at the time it attempted to place the wire transfer.

Finally, despite all the problems SAI encountered in making the wire transfer on January 4, 2008, SAI did not seek a waiver for the late upfront payment until nearly two weeks after the upfront payment deadline.²¹ In the few cases in which the upfront payment deadline was waived, the applicant informed the Commission either immediately after the deadline or immediately after it became aware that there was a problem.²² SAI's lack of attention to the matter indicates something short of extraordinary due diligence.

SAI has failed to demonstrate that it was sufficiently diligent in making or following through on its payment arrangements and that its particular circumstances merit waiving the upfront payment deadline. The upfront deadline is not simply a matter of administrative convenience. Among other purposes, timely submission of an upfront payment assists in establishing that an applicant is financially qualified to participate in an auction.²³ As discussed above, waiving the deadline to afford an applicant additional time to make an upfront payment undermines the rule's purpose by disrupting the auction preparations of the Commission and qualified bidders and potentially delaying the entire auction. In

²⁰ See *Leibman*, 18 FCC Rcd at 9722 (applicant provided copies of its written declarations from its bank, and Mellon Bank had received the funds but returned them because of bank's error); *Charytan/MetroPCS*, 15 FCC Rcd at 24,541 (applicant provided letter from bank that confirmed the facts); *Hayes-Bell*, 15 FCC Rcd at 14,732 ¶ 8 (bank error prevented transfer despite broadcast auction applicant having provided correct wire instructions four days in advance of deadline and sufficiently funded account).

²¹ Because SAI's Waiver Request was not submitted until well after the close of business on Thursday January 17, 2008, in effect, it was as if SAI filed it on Friday January 18, 2008. Additionally, Commission records indicated that payment was not actually received by the Commission's lockbox bank until January 8, 2008. In most cases where the Commission has granted a waiver of the upfront payment deadline, payment was made the following business day. See, e.g., *Charytan/MetroPCS*, 15 FCC Rcd at 24,541 n.14 (payment made next business day); *Leibman*, 18 FCC Rcd at 9724 (payment made next business day). Compare *Hayes-Bell*, 15 FCC Rcd at 14,730 ¶ 4 (payment received several days after deadline, but only two days after bank notified broadcast auction applicant that funds had been returned due to the bank's error).

²² *Charytan/MetroPCS*, 15 FCC Rcd at 24,540 (applicant filed request three days after deadline and before the public notice announcing the qualified bidders); *Leibman*, 18 FCC Rcd at 9721 (applicant filed request two days after deadline). Compare *Hayes-Bell*, 15 FCC Rcd at 14,732 ¶ 8 (applicant initiated payment process four days prior to payment deadline and made payment and sought relief 10 days after deadline, but only two days after the bank notified applicant that its funds had been returned because of the bank's error).

²³ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2377 ¶ 169 (1994) ("*Competitive Bidding Second Report and Order*"); *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 899 (D.C. Cir. 2004) (affirming Commission denial of request for waiver of final payment deadline).

addition, waiving the deadline for any single applicant inherently raises questions of fairness to other applicants who met the deadline.²⁴ The Commission has determined that a policy of strict adherence to payment deadlines is necessary to serve the public interests of integrity, fairness, and efficiency of the auction process.²⁵ In light of the public interest in maintaining the deadline and statutorily-mandated auction schedule and the absence of a particularized showing of extreme circumstances here, we deny SAI's request for waiver of the upfront payment deadline.

This action is taken under delegated authority pursuant to Section 0.331 of the Commission's rules.²⁶

Sincerely,

Margaret W. Wiener, Chief
Auctions and Spectrum Access Division
Wireless Telecommunications Bureau

²⁴ See Letter to Bernard E. Klein, Sonar Radio Corp., from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 08-95 (rel. Jan. 16, 2008) (denying waiver of upfront payment deadline).

²⁵ See *Delta Radio*, 387 F.3d at 901. "Entering the auction unprepared to pay on schedule is precisely the kind of conduct the FCC rules are designed to deter." *Id.* at 903.

²⁶ 47 C.F.R. § 0.331.