

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

In re)
)
NBVDS Investment, L.L.C.)
)
Request for Waiver of Section 1.2105 of the)
Commission's Rules for Auction 101)

MEMORANDUM OPINION AND ORDER

Adopted: October 10, 2018

Released: October 10, 2018

By the Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a request filed by NBVDS Investment, L.L.C. (NBVDS) for waiver of the deadline for filing a short-form application to participate in Auction 101. NBVDS failed to file its short-form application (FCC Form 175) prior to the closing of the filing window and now seeks a waiver of section 1.2105 of the Commission's rules so that it may seek to become qualified to bid in Auction 101. For the reasons set forth below, we deny NBVDS's request for waiver.

II. BACKGROUND

2. On August 3, 2018, the Commission established application and bidding procedures for the auction of 3,072 Upper Microwave Flexible Use Services licenses in the 27.5-28.35 GHz (28 GHz) bands (Auction 101).¹ At the same time, the Commission established the procedures for the auction of licenses in the 24 GHz band (Auction 102).² The Commission announced that the windows for electronically filing a separate short-form application to participate in Auction 101 and/or 102 would run concurrently and open at 12:00 p.m. Eastern Time (ET) on September 5, 2018 and close at 6:00 p.m. ET on September 18, 2018.³

3. NBVDS submitted its short-form application to participate in Auction 102 prior to the close of the window on September 18, 2018, but did not submit an application for Auction 101.⁴

¹ See *Auctions of Upper Microwave Flexible Use Licenses for Next-Generation Wireless Services; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auctions 101 (28 GHz) and 102 (24 GHz)*; *Bidding in Auction 101 Scheduled to Begin November 14, 2018*, Public Notice, FCC 18-109 (Aug. 3, 2018) (*Auctions 101 and 102 Procedures Public Notice*).

² *Id.*

³ *Id.* at 12-13, 49, paras. 24-25, 27, 137-38.

⁴ See *Auctions of Upper Microwave Flexible Use Licenses for Next-Generation Wireless Services; Status of Short-Form Applications to Participate in Auctions 101 (28 GHz) and 102 (24 GHz)*, Public Notice, DA 18-1035 at Attachs. A-B, D (WTB Oct. 10, 2018).

4. On September 28, 2018, NBVDS filed a request for a waiver of section 1.2105 to permit the submission of an application for Auction 101 and sought expedited action.⁵ In support of its Request, NBVDS asserts that its Auction 101 Form 175 application was “completed” prior to the 6:00 p.m. ET deadline on September 18, but it could not certify and submit its application because a “widespread” and “unprecedented” Distributed Denial of Service (DDoS) event disrupted its ability to access its application between 5:55 p.m. ET and the 6:00 p.m. deadline.⁶

III. DISCUSSION

5. To receive a waiver under section 1.925 of the Commission’s rules, a petitioner must demonstrate that: (1) 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 waiver would be in the public interest, or (2) in view of the unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative to seeking a waiver of the rule.⁷ For the reasons described below, we find that NBVDS has not demonstrated that its request for waiver meets either prong of this standard, and we therefore deny its request.

6. NBVDS has failed to demonstrate that a waiver of the requirement to certify and submit a short-form application by the filing deadline would not frustrate the purpose of the rule. The Commission has long explained that uniform deadlines for various stages of the auction application process provide applicants with certainty and give the Commission time for orderly application review and auction preparation.⁸ The underlying purpose of rules establishing deadlines is best served by their consistent application, which serves the public interest by providing fair and equal treatment to applicants by subjecting them to the same timeframes for making auction-related decisions.⁹

⁵ Request for Waiver of NBVDS Investment, L.L.C. (Sept. 27, 2018) (Request). The Request is dated September 27, 2018, although the Commission received it on September 28. In addition to section 1.2105, the Request seeks waiver of section 30.301. We will not specifically address that section herein because it does not independently contain a deadline requirement and simply applies the Part 1 rules to the licenses being auctioned.

⁶ *Id.* at 2-4. Absent the required certifications, an auction application is not considered complete. 47 CFR § 1.2105(a)-(b); *see infra* para. 13.

⁷ *See* 47 CFR § 1.925(b)(3)(i)-(ii). We note that section 1.925 governs waivers of rules in the context of wireless radio services licenses and that the waiver standard applied under section 1.3 is substantially the same as the waiver standard applied under section 1.925. *See Application of Delta Radio, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16889, 16891, para. 7 & n.19 (2003) (citing *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999), *aff’d sub nom.*, *Delta Radio, Inc. v. FCC*, 387 F.3d 897 (D.C. Cir. 2004).

⁸ *See, e.g., First Auction of Interactive Video and Data Service (IVDS) Licenses: Request for Waiver of Applications Deadline*, Memorandum Opinion and Order, 11 FCC Rcd 1134 (1996) (Commission decision affirming denial of waiver of short-form filing deadline and emphasizing importance of strictly enforcing deadlines), *affirming First Auction of Interactive Video and Data Service (IVDS) Licenses: Request for Waiver of Applications Deadline*, Order, 10 FCC Rcd 5415 (WTB 1995); *see also Vero Beach Broadcasting, LLC – Request for Waiver of Short-Form Deadline for FM Broadcast Auction No. 62*, Letter Order, 20 FCC Rcd 19346 (WTB 2005) (*Vero Beach*) (short-form deadline provides reasonable certainty to applicants of fair and predictable application of auction rules and procedures, including enforcement of deadlines; deadlines allow applicants to plan for auction and a deadline waiver would undermine Commission’s ability to review short-form applications in timely manner because it would encourage similar requests).

⁹ *See, e.g., Vero Beach*; *see also Request for Extensions of Time To File a Short-Form Application and Submit Down Payment in Auction No. 59*, Letter Order, 20 FCC Rcd 8750 (WTB 2005); *Request for Waiver of Short-Form Deadline for Auction No. 44*, Letter Order, 17 FCC Rcd 16301 (WTB 2002).

7. As a result, in the *Auctions 101 and 102 Procedures Public Notice*, the Commission stated: “**Late applications will not be accepted.**”¹⁰ It further made clear that an applicant “bears full responsibility” for submitting a timely application and warned that if an applicant “fails to make the required certifications in its FCC Form 175 by the filing deadline, its application will be deemed unacceptable for filing and cannot be corrected after the filing deadline.”¹¹ The Commission “strongly urged” applicants to “file early” and affirmed that applicants “are responsible for allowing adequate time for filing their applications.”¹² The Wireless Telecommunications Bureau subsequently released short-form application instructions and an online tutorial that emphasized the importance of the short-form application deadline.¹³

8. NBVDS claims that the Commission’s policy objectives would not be frustrated by a waiver because the DDoS event that prevented NBVDS from certifying and submitting its application was an “unusual and compelling circumstance.”¹⁴ We do not agree. The auction process includes multiple succeeding deadlines, including application filing deadlines, the upfront payment deadline, and deadlines at the end of each round of bidding, which must be strictly observed to assure that an auction is fair and objective to all participants. A waiver of the short-form filing deadline would compromise these deadlines and undermine auction integrity. Absent strict enforcement, participants would have opportunities to argue what they *meant* to do—e.g., certify and submit an application by the deadline, place a bid, etc.—rather than what they actually did in the Commission’s auction-related systems in the time allotted to all participants equally. For this reason, the Commission advises applicants that they must take responsibility for their own action or inaction in the auction process.¹⁵

9. We are not persuaded that NBVDS’s asserted intent to deliver enhanced broadband services using 28 GHz spectrum to current and future customers in rural areas outweighs the public interest benefit in consistent enforcement of the Commission’s auction-related deadlines.¹⁶ To the extent NBVDS qualifies to bid in Auction 102, which will begin after the close of Auction 101, we would

¹⁰ *Auctions 101 and 102 Procedures Public Notice* at 49, para. 137.

¹¹ *Id.* at 14, para. 30 (citing 47 CFR § 1.2105(a)(2)); *see also supra* note 6.

¹² *Auctions 101 and 102 Procedures Public Notice* at 16, para. 37.

¹³ *See Short-Form Application (FCC Form 175) Filing Instructions for Auction 101 and Auction 102* at 1, 27, paras. 2, 110 (Aug. 6, 2018), <https://www.fcc.gov/auction/101/education> (“**Applications must be submitted and confirmed prior to 6:00 p.m. ET on September 18, 2018.** . . . Late applications or unconfirmed submissions will not be accepted.”); *Auctions 101 and 102 Application Tutorial*, http://wireless.fcc.gov/auctions/101/Tutorial_101_102/presentation.html.

¹⁴ Request at 6.

¹⁵ In the parallel context of submitting bids in the Commission’s Auction System, the Commission declared that it will have no obligation to resolve issues that arise “outside the Auction System or [are] attributable to a bidder, including, but not limited to, a bidder’s hardware, software, or Internet access problem that prevents the bidder from submitting a bid prior to the end of a round,” on behalf of a bidder. *See Auctions 101 and 102 Procedures Public Notice* at 57, para. 164.

¹⁶ *See* Request at 8. NBVDS’s assertions of benefits to the rural Oklahoma communities are similar to the public interest arguments the Commission has consistently rejected in declining to grant other requests for waiver of its competitive bidding rules. *See, e.g., Application of The ERIE Radio Co., LLC for a Construction Permit for a New FM Broadcast Station at Westfield, NY; Informal Request for Extension of Time*, Memorandum Opinion and Order, 32 FCC Rcd 3890, 3896 & n.51, para. 17 (MB/WTB 2017); *Southern Communications Systems, Inc.*, Second Memorandum Opinion and Order, 16 FCC Rcd 18357, 18361, para. 9 (2001) (“[E]nforcing the Commission’s payment rules . . . serves the public interest better than relying on the wholly unsubstantiated possibility that [petitioner] might have provided service in its license area sooner than the successor licensees will.”); *see also Aircom Consultants, Inc.*, Order on Reconsideration, 18 FCC Rcd 1806, 1810-11, paras. 12-13 (WTB 2003) (following Commission precedent in rejecting the petitioner’s argument that the down payment and default rules should be waived to provide communications services to underserved tribal lands and rural areas).

expect that NBVDS could bid for the 24 GHz spectrum offered in that auction to be used in the same manner in the same areas of the country.

10. In addition, NBVDS presents no unique facts that persuade us that it would be unfair or inequitable to deny NBVDS's requested relief. By its own admission, NBVDS waited until approximately 5:55 p.m. ET to attempt to certify and submit its short-form application for Auction 101.¹⁷ That is the last *five minutes* of the *two-week* short-form application filling window. Indeed, having done an internal staff investigation in response to phone calls from NBVDS and its counsel, we know that NBVDS's Auction 102 application was the last one submitted. Only two other applicants submitted applications in the last 30 minutes before the deadline. NBVDS provides no reason—and importantly, takes no responsibility—for its failure to act sooner. Had NBVDS planned ahead, the purported “unprecedented” DDoS attack that NBVDS first noticed at 5:43 p.m. ET would have been immaterial.¹⁸

11. NBVDS bases its argument that unique facts justify a waiver on a Commission public notice from 1985 that is wholly unrelated to the spectrum auction context.¹⁹ Assuming that this precedent would apply here, the facts alleged by NBVDS are not equivalent to the examples the Commission provided of “a debilitating earthquake or a city-wide power outage that brings transportation to a halt.”²⁰ In fact, the 43-minute disruption or degradation of internet service on a particular provider's network may be more comparable to issues with copying machines or delivery services, which the Commission explained do not warrant a waiver of a filing deadline.²¹ It was a temporary, relatively isolated issue that may have prevented the delivery of some data to the Commission's Auction Application System. Notably, it was not severe enough to prevent NBVDS from submitting its Auction 102 application minutes earlier.

12. Furthermore, the Commission's cautionary language in the public notice more strongly supports the denial of NBVDS's Request. The Commission warned:

[A]pplicants who wait until the eleventh hour to meet Commission deadlines will be held to assume the risk for almost all events which may occur to prevent timely filing. To minimize the risk, applicants should build into their schedules a reasonable margin of error in anticipation of circumstances which may cause delay.²²

NBVDS did not heed this direction. Contrary to NBVDS's claim that it had no reasonable alternative due to the DDoS attack,²³ it did in fact have one: planning ahead.

13. We disagree with NBVDS that denying its Request would “chang[e] the [short-form application] deadline without notice.”²⁴ To the contrary, NBVDS is asking us to *extend* the deadline and accept required certifications that were provided to the Commission in its Request over 10 days later and by its own admission, seven days after learning of the DDoS attack.²⁵ We are aware of no issue with the Commission's Auction Application System that would have shortened the short-form application filing

¹⁷ See Request at Decl. of Rachel Looney at para. 9.

¹⁸ See *id.* at 2, 4. Conversely, granting the Request would be unfair to those applicants and potential applicants that were bound by the Commission's 6:00 p.m. deadline on September 18.

¹⁹ See Request at 6 (citing *FCC Overrules Caldwell Television Associates, Ltd.*, Public Notice, FCC 85-534, 58 R.R. 2d 1706 (1985) (*Caldwell Television*)).

²⁰ *Caldwell Television* at 1.

²¹ *Id.*

²² *Id.* at 1-2.

²³ See Request at 6.

²⁴ Request at 7.

²⁵ *Id.* at Decl. of Jacob E. Baldwin at para. 12.

window—and none is alleged by NBVDS.²⁶ No applicant or potential applicant for Auctions 101 and 102 has identified a problem with the functionality of the Auction Application System during the entirety of the filing window, and two applicants besides NBVDS successfully submitted applications during the last 30 minutes the filing window was open. As a result, all potential applicants would have the same opportunity to participate in the auction only if we deny NBVDS's Request.²⁷ Despite NBVDS's claim that its Auction 101 short-form application "was already complete" by the deadline,²⁸ that is simply not true. Our records indicate that NBVDS never visited two required pages of the Auction 101 application,²⁹ and NBVDS's submission of its former defaulter/delinquency statement and its certifications along with its Request belies that claim.³⁰

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309, and section 1.925 of the Commission's rules, 47 CFR § 1.925, that NBVDS Investment, L.L.C.'s Request for Waiver, dated September 27, 2018, is DENIED.

²⁶ The Request itself has no such allegation, although NBVDS's declarant Rachel Looney states that the Auction Application System "displayed an error message." Request at Decl. of Rachel Looney at paras. 9-10. However, our investigation shows that at the time indicated on her browser history, NBVDS was on the short-form application's "Summary—Error Summary" page, which is a summary page correctly displayed to all applicants prior to the two required certification pages not accessed by NBVDS. See *Auctions 101 and 102 Application Tutorial* at § 4.3.10.2 (Short-Form Application (FCC Form 175) Demonstration)). Moreover, when NBVDS's declarant Jacob Baldwin contacted Commission staff at 5:57 p.m. ET, Mr. Baldwin did not identify any issue with submitting NBVDS's applications. See Request at Decl. of Jacob E. Baldwin at para. 8 (explaining that this call concerned issues uploading attachments). Given the short time before the filing window closed, Commission staff twice asked whether NBVDS's applications had been submitted, and Mr. Baldwin responded affirmatively.

²⁷ In this regard, NBVDS's reliance on the waiver granted in *Application of Metricom, Inc.* is misplaced. See Request at 7, citing *Application of Metricom, Inc.*, 12 FCC Rcd 15157, 15159, para. 6 (WTB Commercial Wireless Div. 1997). That case involved very different circumstances; there, the Commercial Wireless Division emphasized that the "filing deadline at issue was a post auction deadline," that the applicant's "actions did not delay the auction process or prejudice other applicants," and that the party immediately undertook corrective efforts to try to avoid missing the deadline entirely. *Id.*

²⁸ Request at 7.

²⁹ The specific pages are the "Former Defaulter, Delinquency Statement" and "Certify & Submit" pages. An applicant cannot navigate to the Certify & Submit page unless one of the two former defaulter/delinquency statements is answered.

³⁰ See Request at Attach. A.

15. This action is taken pursuant to delegated authority under sections 0.283, 0.131 and 0.331 of the Commission's rules, 47 CFR §§ 0.283, 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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