

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

In re)
)
MEI Telecom, Inc.)
)
Request for Waiver of Upfront Payment Deadline)
for Auction 105)
)

ORDER

Adopted: July 23, 2020

Released: July 23, 2020

By the Chief, Auctions Division, Office of Economics and Analytics

I. INTRODUCTION

1. In this Order, we deny a request from MEI Telecom, Inc. (MEI) asking that the Commission treat as timely an upfront payment for Auction 105 that was submitted after the deadline for doing so.¹ For the reasons set forth below, we deny MEI's request for waiver of the upfront payment deadline.

II. BACKGROUND

2. MEI's request arises out of its efforts to participate in Auction 105, an auction of Priority Access Licenses in the Citizens Broadband Radio Service in the 3550-3650 MHz band, for which bidding is scheduled to start on July 23, 2020.

3. The Commission's competitive bidding rules provide that in order to be qualified to bid in a spectrum auction, an applicant must have on file a timely submitted and complete short-form application (FCC Form 175), together with any appropriate upfront payment set forth by Public Notice.² In a Public Notice released on March 25, 2020, the Office of Economics and Analytics and the Wireless Telecommunications Bureau established a deadline of 6:00 p.m. ET on June 19, 2020, for submission of upfront payments for applicants seeking to participate in Auction 105.³ Such payments were required to be made via wire transfer to the Commission's account at the U.S. Treasury.⁴ Each applicant was also required to send an FCC Remittance Advice Form (FCC Form 159) to the Commission by the upfront deadline to accompany its upfront payment.⁵

¹ See MEI Telecom, Inc. Verified Informal Request for Emergency Relief (June 23, 2020) (Waiver Request).

² See 47 CFR §1.2105(a).

³ *Auction of Priority Access Licenses for the 3550-3650 MHz Band Rescheduled to Begin July 23, 2020; Auction 105 Short-Form Application Deadline Postponed to May 7, 2020*, AU Docket No. 19-244, Public Notice, 35 FCC Rcd 2891 (OEA/WTB 2020). See also 47 CFR §1.2106(a) (upfront payments may be established by public notice).

⁴ See *Auction of Priority Access Licenses for the 3550-3650 MHz Band; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 105; Bidding in Auction 105 Scheduled to Begin June 25, 2020*, AU Docket No. 19-244, Public Notice, 35 FCC Rcd 2140, 2182 para. 131 (2020) (*Auction 105 Procedures Public Notice*).

⁵ See *id.* at 2182-83, paras. 131, 134.

4. In establishing the procedures for Auction 105, the Commission emphasized that each applicant was “responsible for obtaining confirmation from its financial institution that its wire transfer to the U.S. Treasury was successful and from Commission staff that the upfront payment was timely received and that it was deposited into the proper account.”⁶ The Commission also cautioned auction applicants regarding the importance of planning ahead to account for last-minute problems; in particular, Auction 105 applicants were warned to avoid untimely payments by discussing wire transfer arrangements with their bank well in advance of the deadline and to leave sufficient time to avoid any problems.⁷ Moreover, the Commission warned applicants that failure to submit a timely upfront payment “will result in dismissal of the short-form application and disqualification from participation in the auction.”⁸

5. MEI timely filed a short-form application for Auction 105. MEI’s Form 159 was received by the Commission prior to the June 19th deadline as well. However, MEI did not make an upfront payment by the June 19th deadline; instead, its payment was received in the Commission’s account on the following business day, June 22nd.

6. In support of its waiver request, MEI asserts that it submitted its FCC Form 159 and received from its bank a “Wire Approval Confirmation” dated June 19, 2020, the day of the deadline.⁹ MEI’s Waiver Request states that “on the following business day, MEI received notice that because of a bank error beyond MEI’s reasonable control, the payment had, in fact, not gone through.”¹⁰ MEI says it “took immediate proactive steps to resolve the payment processing issue.”¹¹ MEI did not, however, elaborate on the nature of any error that ultimately resulted in missing the June 19th upfront payment deadline.

III. DISCUSSION

7. The Commission may grant a request for a waiver if the requesting party shows that: (i) the underlying purpose of the rule would not be served or would be frustrated by its application to the instant case, and that a grant of the waiver would be in the public interest; or (ii) in view of the unique or unusual facts 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.¹² On the basis of the record before us, we are not persuaded that MEI has demonstrated that application of the deadline in its case would undercut or frustrate its purpose, nor do we find that MEI presented unique circumstances sufficient to justify grant of its waiver request.

8. MEI does not explain how the purpose of the rule would not be served or would be frustrated by applying the deadline in these circumstances. The Commission has explained on multiple occasions that the upfront payment deadline is purposefully set at a point in the auction timeline to provide qualified bidders and the Commission with sufficient time to prepare for bidding to begin under the announced schedule.¹³ MEI appears to assert that because its payment was deposited on the next business day after

⁶ *Id.* at 2183, para. 135. This language appears in bold in that Public Notice.

⁷ *See id.* at 2182, para. 133.

⁸ *Id.* at 2183, para. 137. *See also* 47 CFR § 1.2106(c).

⁹ Waiver Request at 1. Proper completion of a Form 159 is required to ensure accurate crediting of upfront payments. *See Auction 105 Procedures Public Notice*, 35 FCC Rcd at 2182, para. 131. Although MEI claims it received a notice of the Commission’s “acceptance” of MEI’s Form 159, *see* Waiver Request at 1, the Commission has no process for “accepting” Form 159s, and therefore does not issue any such notices. MEI provided no documentation to support its assertion.

¹⁰ Waiver Request at 1.

¹¹ *Id.* at 2.

¹² *See* 47 CFR § 1.925(b)(3).

¹³ *See Four Corners Broadcasting, LLC, Request for Waiver of Section 1.2106(a), Closed Broadcast Auction 88*, Letter Order, 25 FCC Rcd 9046, 9048-49 (WTB 2010) (*Four Corners*); *Spectrum Acquisitions, Inc. Application to*

the deadline, applying the deadline would frustrate its purpose in its case.¹⁴ This argument ignores the Commission's interest in setting a uniform deadline for all applicants in order to avoid disrupting the Commission's auction preparations and potentially delaying the entire auction. In addition, waiving the deadline for any single applicant inherently raises questions of fairness to other applicants that met the deadline and continue their auction preparations and future applicants that rely on the certainty of the auction process, and would blur the line for determining whether an applicant is entitled to a waiver.¹⁵

9. MEI has also not shown that enforcement of the deadline would be inequitable, unduly burdensome or contrary to the public interest in view of any unique or unusual circumstances. Indeed, we are not persuaded that MEI has presented any unique facts or circumstances that merit waiving its obligation to submit its upfront payment by the established deadline. We disagree with MEI's claims that it "took all reasonable steps to timely remit its upfront payment" and that "the delay in payment was caused by a third party bank error that MEI could not reasonably have anticipated or avoided."¹⁶ In support of its assertion of bank error, MEI provides a "Wire Approval Confirmation" document, but does not explain its significance or how that document might demonstrate that "the delay in payment was caused by a third party bank error that MEI could not reasonably have anticipated or avoided," nor does that document clearly indicate how its bank may have erred, if at all.¹⁷ Further, MEI makes no assertion nor presents any evidence that it had planned ahead to avoid potential last-minute problems or that it took any action to confirm with its bank that its wire transfer was successful. Nor did it verify that the Commission had received the funds, a step that the Commission encouraged each applicant to undertake.¹⁸ We find that MEI's failure to present any evidence of its advance planning efforts or initiation of a wire transfer order well in advance of the deadline and its failure to confirm the receipt by the Commission of its payment certainly do not constitute "all reasonable steps," in light of the Commission's repeated warnings to applicants to remit their upfront payment well in advance of the deadline and plan ahead to account for any unforeseen last-minute problems. MEI chose not to heed the Commission's warning in the *Auction 105 Procedures Public Notice* that applicants are responsible for obtaining confirmation from their financial institution that their wire transfer to the U.S. Treasury was successful and from Commission staff that its upfront payment was timely received and that it was deposited into the proper account. The record does not show that MEI acted with the level of diligence expected of an auction applicant.

10. Indeed, the circumstances presented by MEI do not meet the standard of diligence established in *Tepper*, the upfront payment waiver case it cites in support of its request.¹⁹ At issue in *Tepper* was not the timeliness of a wire transfer, but instead an applicant's inability to fax its Form 159 due to mechanical difficulties with the fax machine at the Commission's bank.²⁰ The applicant in *Tepper* asserted that it tried to notify the Commission of this issue, but it could not do so because the designated Commission contact

Participate in Auction 73 – Request for Waiver of Upfront Payment Deadline, Letter Order, 23 FCC Rcd 4765, 4767 (WTB 2008) (*Spectrum Acquisitions*).

¹⁴ See Waiver Request at 1-2.

¹⁵ See *Four Corners*, 35 FCC Rcd at 9048-49; *Spectrum Acquisitions*, 23 FCC Rcd at 4769-70; Letter to M. Tamber Christian, from Amy J. Zoslov, Chief, Auction and Industry Analysis Division, Wireless Telecommunications Bureau, 14 FCC Rcd 4013, 4015 (WTB 1999).

¹⁶ See Waiver Request at 2.

¹⁷ See *id.* at 1-2; see also Wire Approval Confirmation. We note that the Wire Approval Confirmation document indicates a time of 3:31 pm on June 19th that some approval may have been given or received; that time was less than two and a half hours prior to the 6:00 pm upfront payment deadline.

¹⁸ See *Auction 105 Procedures Public Notice*, 35 FCC Rcd at 2183, para. 135.

¹⁹ See Waiver Request at 2.

²⁰ See Letter to Cary S. Tepper and Larry D. Jones from Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 14 FCC Rcd 15469, 15469 (WTB 1999) (*Tepper*).

person's voicemail was full and could not receive new messages.²¹ Contrary to MEI's suggestion, we are unable to conclude that its failure to complete its wire transfer payment by the deadline is comparable to the mechanical difficulties on the part of the Commission's bank, as in *Tepper*.²² MEI does not present any evidence that its failure to deliver a timely upfront payment was due to an issue at the Commission, with deposit of MEI's funds into the Commission's account, or even with its own bank. Indeed, the cautionary language of the closing passage of *Tepper* seems prescient here: "we nevertheless caution auction participants regarding the importance of planning ahead to account for last-minute mechanical and other unforeseen technical difficulties."²³

11. In order to demonstrate the required unique circumstances that differentiate it from all others to which the deadline applies, MEI must also show that no reasonable alternative existed which would have allowed it to comply with rule.²⁴ In MEI's case, it had the reasonable alternative of exercising due diligence prior to the filing deadline.²⁵

12. MEI asserts that like the applicant in *Tepper*, it has the financial qualifications to meet its obligations. MEI claims that it is "financially well qualified to participate in the Auction" and claims that the Commission ultimately received its upfront payment after the deadline.²⁶ However, MEI has failed to sufficiently show that but for its unique circumstances, it would have timely submitted its upfront payment. Without this showing, simply having the funds and missing the upfront payment deadline does not justify a waiver request, as MEI suggests.²⁷ As we have noted previously, our determinations in similar cases have not turned simply on the sufficiency of the applicant's funds but rather on the applicant's diligence in preparing for and ensuring successful completion of its payment.²⁸

13. In short, we are unable to agree with MEI's contention that "MEI took all reasonable steps to timely remit its upfront payment"²⁹ In light of the public interest in predictable and consistent application of auction rules and deadlines, we hereby deny the waiver request submitted by MEI Telecom, Inc.

²¹ See *id* at 15470.

²² Waiver Request at 2 (citing *Tepper*).

²³ *Tepper*, 14 FCC Rcd 15469.

²⁴ See e.g., *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968); *Ted W. Austin, Jr., Application for Review of Order Denying Request for Waiver of Down Payment Deadline for Auction 62*, Memorandum Opinion and Order, 30 FCC Rcd 3486, 3488, para. 6 (2015).

²⁵ See *NBVD Investment, L.L.C. Request for Waiver of Section 1.2105 of the Commission's Rules for Auction 101*, Memorandum Opinion and Order, 34 FCC Rcd 8507, 8511 para. 13 n.31 (2019) (upholding denial of request for waiver of auction short-form application filing deadline).

²⁶ See Waiver Request at 2.

²⁷ See *id*.

²⁸ See, e.g., *Four Corners*, 25 FCC Rcd at 9051.

²⁹ Waiver Request at 2.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to delegated authority under Sections 0.21(m) and 0.271 of the Commission's rules, 47 CFR §§ 0.21(m), 0.271, MEI Telecom, Inc.'s Verified Informal Request for Emergency Relief, dated June 23, 2020, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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Office of Economics and Analytics