

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

In the Matter of
Application of
Ramona Lee Hayes-Bell
for A New FM Construction Permit
On Channel 236A
At Pahrump, Nevada

MEMORANDUM OPINION AND ORDER

Adopted: August 7, 2000

Released: August 7, 2000

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a petition for reconsideration filed by Pahrump Valley Broadcasters, Inc. ("PVBI") on November 22, 1999. PVBI seeks reconsideration of a decision by the Wireless Telecommunications Bureau ("Bureau") granting Ramona Lee Hayes-Bell ("Bell"), an applicant to participate in Auction No. 25, a waiver of the Commission's upfront payment deadline. For the reasons set forth below, we deny PVBI's petition for reconsideration.

II. BACKGROUND

2. Both Bell and PVBI filed timely applications to bid in Auction No. 25 for a construction permit for an FM station in Pahrump, Nevada. The deadline for submission of upfront payments for Auction No. 25 was September 13, 1999. By letters dated September 23, 24 and 27, 1999, Bell sought reconsideration of the Bureau's decision that Bell was not qualified to participate in Auction No. 25 or, alternatively, a waiver of the Commission's upfront payment rules. On September 27, 1999, the Bureau granted Bell's

1 Petition for Reconsideration of Pahrump Valley Broadcasters, Inc., filed October 26, 1999 ("PVBI Petition").

2 See Closed Broadcast Auction — Status of Applications to Participate in the Auction, Public Notice, 14 FCC Rcd 14113 at Attachment A (1999) ("Closed Broadcast Auction Status Public Notice").

3 Id. at 14114-15.

4 See Letters from Dean R. Brenner, Attorney for Ramona Lee Hayes-Bell, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, re: Petition for Reconsideration or Waiver; Application of Ramona Lee Hayes-Bell for a New FM Radio Station at Pahrump, NV (September 23, 24 and 27, 1999). See also 47 C.F.R § 1.2105(a).

waiver request.⁵

3. According to written declarations submitted by Bell's bank, Nevada State Bank ("NSB"), Bell appeared in person at the offices of NSB on September 9, 1999, and provided the bank with written instructions to wire an upfront payment to the Commission's account at Mellon Bank.⁶ The written instructions Bell provided to NSB contained all of the necessary information⁷ for completion of the wire transfer to the designated Commission account.⁸ NSB affirms that Bell's account contained sufficient funds for the transfer to be made as Bell requested.⁹ On that same day, NSB debited Bell's account and wired the funds to Mellon Bank, however NSB did so without listing the Commission's account number in the message accompanying the wire, as provided in Bell's instructions.¹⁰

4. Mellon Bank returned the funds to NSB on the same day the funds were wired, however, NSB failed to notify Bell that the funds had been returned.¹¹ Bell contends that she first learned of NSB's failed transfer attempt on September 21, 1999, when she telephoned NSB after learning that the Commission had listed her as an unqualified bidder in Auction No. 25.¹² NSB claims that it also first became aware of its error in executing the wire transfer on September 21, 1999.¹³ After determining that the wire transfer had not been properly executed, NSB successfully executed the wire transfer to the designated account at Mellon Bank on September 23, 1999.

5. PVBI seeks reconsideration of the Bureau's decision granting Bell's request for waiver of the

⁵ See Pahrump, Nevada Closed Broadcast Auction to be Held on October 6, 1999 — 3 Qualified Bidders, *Public Notice*, DA 99-2062 at 1 n.3 (rel. October 1, 1999) ("*October 1, 1999 Public Notice*"). Consequently, the Bell application was reinstated and the Pahrump, Nevada market was removed from Auction No. 25 to allow time to reconstitute the pool of applicants to include Bell. The Pahrump, Nevada market was subsequently auctioned in Auction No. 27. See *October 1, 1999 Public Notice* at 1.

⁶ See Declaration of Barbara H. Boos, Vice President of Nevada State Bank, ¶ 2, dated September 23, 1999, appended as an attachment to Opposition of Ramona Lee Hayes-Bell, filed November 10, 1999 ("*NSB Declaration*").

⁷ The information required to accompany wire transfer instructions was set forth in a July 9, 1999, public notice. See Closed Broadcast Auction; Notice and Filing Requirements for Auction of AM, FM, TV, LPTV and FM and TV Translator Construction Permits Scheduled for September 28, 1999; Minimum Opening Bid and Other Auction Procedural Issues, *Public Notice*, 14 FCC Rcd 10632, 10645-46 (1999) ("*Auction No. 25 Public Notice*").

⁸ NSB Declaration at ¶ 2.

⁹ *Id.* at ¶ 3.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 4.

¹² See Opposition of Ramona Lee Hayes-Bell at 4, filed November 10, 1999; Closed Broadcast Auction — 224 Qualified Bidders, *Public Notice*, DA 99-1912 at Attachment C (rel. September 17, 1999) ("*Qualified Bidders Public Notice*"); Closed Broadcast Auction — Revised Attachments Listing Qualified Bidder Status, *Public Notice*, DA 99-1949 at Attachment C (rel. September 22, 1999).

¹³ See NSB Declaration at ¶ 6.

upfront payment deadline for Auction No. 25. PVBI argues that Bell was not entitled to waiver of the deadline because she was not sufficiently diligent in determining whether the Commission had received her upfront payment.¹⁴ PVBI contends that the Bureau should have followed previous decisions in which the Commission declined to waive its upfront payment deadline.¹⁵

III. DISCUSSION

6. We disagree with PVBI's contention that the Commission's previous decisions not to waive the upfront payment deadline are applicable to the instant case. To obtain a waiver of the Commission's upfront payment deadline, Bell was required to show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative.¹⁶ For the reasons cited below, we find that the circumstances of Bell's waiver request met the Commission's standard for granting a waiver.

7. PVBI relies on cases in which the Commission decided that the upfront payment deadline should not be waived because the bidders had not exercised reasonable diligence that would have enabled them to meet the deadline. In addition, PVBI relies on *Haeder*, a case in which the applicant failed to file its short-form application within the filing deadline.¹⁷ In *Haeder*, the applicant's computer system was unable to view or download information contained on the Commission's website. Furthermore, the applicant was unaware of the filing deadline even though the deadline had been published in public notices and the *Federal Register*.¹⁸ In *Personal Communications Corporation*,¹⁹ the applicant missed an upfront payment deadline because it relied on its investor to submit the applicant's upfront payment to the Commission. Similarly, in *M. Tamber Christian*,²⁰ the applicant was uncertain of the upfront payment deadline because its principal did not timely review the Commission's public notices. Thus, the

¹⁴ PVBI Petition at 5.

¹⁵ *Id.*

¹⁶ 47 C.F.R. §1.925.

¹⁷ Letter from Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Richard Haeder, DA 99-1854 (rel. September 14, 1999) ("*Haeder*").

¹⁸ PVBI cites *Haeder* for the proposition that an applicant's failure to meet pre-auction deadlines is not a special circumstance warranting a waiver. PVBI Petition at 4. PVBI misconstrues this decision. The Division held that applicants are responsible for maintaining current information regarding the Commission's public notices pertaining to auctions and ensuring that their computer systems are adequate to connect and interface with the Commission's filing software. Thus, *Haeder* stands for the proposition that failure of an applicant's computer system does not constitute a special circumstance warranting a waiver. *Haeder* at 2.

¹⁹ Emergency Petition for Waiver of the Deadline for Submission of Upfront Payments for Broadband PCS Auction Filed by Personal Communications Corporation, 10 FCC Rcd 2124 (1995) ("*Personal Communications Corporation*").

²⁰ Letter from Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to M. Tamber Christian, 14 FCC Rcd 4013 (Wireless Telecom. Bureau 1999) ("*M. Tamber Christian*").

applicant did not take all reasonable and diligent steps to prevent missing the upfront payment deadline. We find these cases to be distinguishable from the present case because the applicants in these cases were significantly less diligent than Bell in attempting to meet the Commission's deadlines.

8. In contrast to the cases cited above, Bell would not have missed the upfront payment deadline were it not for the bank's failure to include the necessary information to enable the funds to be transferred to the Commission's account. Bell had presented correct wire instructions to NSB four days before the upfront payment deadline. At the time of the transfer, Bell had sufficient funds in her account for the upfront payment and thus, she did not seek a waiver of the deadline in order to obtain additional time to raise the needed capital.²¹ Moreover, the record in the present case reflects that Bell contacted NSB immediately upon learning that she was listed in the Commission's public notices as an unqualified bidder.²² The Commission requires upfront payments in all of its spectrum auctions to ensure that only serious, qualified bidders participate.²³ Under the circumstances in Bell's case, we continue to believe that the underlying purpose of the rule would not be served by its application and that grant of the requested waiver was in the public interest.

9. The present case is also distinguishable from the *Bell Mountain* decision, in which the Division denied the applicant a waiver of the upfront payment deadline. In *Bell Mountain*,²⁴ the applicant had not included an ABA routing number in the wire instructions to its bank, thus contributing to the bank's failure to timely execute the wire transfer of funds to the Commission's account. Furthermore, the applicant in *Bell Mountain* initiated the wire transfer process on the day of the payment deadline, and could have avoided missing the deadline if it had allowed more time for the wire transfer process to be completed.²⁵ In contrast, Bell would not have avoided the error committed by her bank in

²¹ The Auction and Industry Analysis Division ("Division") has previously granted a waiver of the upfront payment deadline where the applicant's actions demonstrated that, but for mechanical difficulties with a facsimile machine at the Commission's bank, it would have been able to meet the upfront payment deadline and there was no question regarding applicant's ability to meet its financial obligations. See Letter from Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Messrs. Cary S. Tepper and Larry D. Jones, DA 99-1903 (rel. September 17, 1999) ("*Tepper*").

²² See Opposition of Ramona Lee Hayes-Bell at 4.

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, 2377-78, ¶¶ 169, 171 (1994).

²⁴ Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Messrs. Thomas Gutierrez and Todd Slamowitz, 15 FCC Rcd 6217 (2000) ("*Bell Mountain*"), *recon. pending*, Petition for Reconsideration of Bell Mountain Communications, Inc., filed May 11, 2000.

²⁵ See *id.* at 6218. See also Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Mr. Jason Bunch, DA 00-737 (rel. April 3, 2000) (applicant initiated processing of the wire payment the day of the payment deadline, leaving little time for applicant to become familiar with the requirements of the process). The Commission has repeatedly cautioned auction participants regarding the importance of planning ahead to account for unforeseen last-minute difficulties. In particular, applicants in Auction No. 25 were warned to avoid untimely payments by discussing arrangements (including bank closing schedules) with their banker several days before they plan to make a wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline. See *Auction No. 25 Public Notice*, 14 FCC Rcd at 10645.

executing the wire transfer, even if she had provided the bank with wire transfer instructions more than four days in advance of the upfront payment deadline.

10. PVBI also contends that the Bureau's actions in granting a waiver were not in accordance with Commission procedures, and that PVBI was prejudiced by being required to bid against Bell in the auction.²⁶ PVBI further characterizes the Bureau's decision as an action by the Chairman and, alternatively, an action by the Commission.²⁷ This reasoning is erroneous. The Bureau's reference to its internal discussions does not transform its decision into something other than a Bureau decision. Furthermore, the Bureau's decision to grant Bell's request for waiver was not procedurally defective because PVBI still has available to it all of the review procedures that are available to aggrieved parties under the Commission's rules.²⁸

11. Finally, PVBI asserts that the Bureau's decision to grant Bell a waiver of the upfront payment deadline should not have been based on Bell's status as a designated entity. Although PVBI provides no factual basis for its argument,²⁹ we take this opportunity to affirm that the Bureau's decision to grant Bell a waiver of the upfront payment deadline was not based in any way on her designated entity status.

IV. CONCLUSION

12. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 303(r) and the authority delegated pursuant to Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the Petition for Reconsideration filed by Pahrump Valley Broadcasters, Inc. on November 19, 1999, IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Vaughan,
Deputy Chief,
Wireless Telecommunications Bureau

²⁶ See PVBI Petition at 5-12.

²⁷ See *October 1, 1999 Public Notice* at 1 n.3.

²⁸ See, e.g., 47 C.F.R. §§ 1.104, 1.106, 1.115.

²⁹ See PVBI Petition at 12-13.