

DA 99-515
March 15, 1999

M. Tamber Christian, Esq.
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2120 L Street, N.W., Suite 520
Washington, D.C.

Dear Ms. Christian:

This letter responds to the Request for Extraordinary Relief filed by you on behalf of Message Express Company ("MEC").¹ MEC requests that we waive the upfront payment deadline of March 1, 1999, 6:00 p.m. (EST) for Auction No. 22 because the applicant's principal mistakenly believed that the filing deadline was March 3, 1999.²

In order to obtain a waiver of the Commission's upfront payment deadline, MEC must show "(i) that the underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or (ii) that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest."³ For the reasons cited below, we find that MEC's *Request* fails to meet the Commission's criteria for obtaining a waiver.

On December 23, 1998, the Commission first notified applicants for Auction No. 22 that the deadline for submission of upfront payments was 6:00 p.m. (EST) on March 1, 1999.⁴ The

¹ See Message Express Company, Request for Extraordinary Relief, filed March 3, 1999 ("*Request*"). See also, Letter from M. Tamber Christian to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission (March 10 1999) ("*Letter*").

² See *Request* at 2; "Declaration of Robert Fisher, General Manager, Message Express Company," attachment to *Request* and resubmitted in original form in *Letter*.

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

⁴ See "Auction of C, D, E, and F Block Broadband PCS Licenses; Notice and Filing Requirements for Auction of C, D, E, and F Block Broadband Personal Communications Services Licenses Scheduled for March 23, 1999; Minimum Opening Bids and Other Procedural Issues," *Public Notice*, DA 98-2604 (rel. December 23, 1998); see also "Correction to Attachment A; Auction of C, D, E, and F Block Broadband PCS Licenses; Notice and Filing Requirements for Auction C, D, E, and F Block Broadband Personal Communications Services Licenses Scheduled for March 23, 1999; Minimum Opening Bids and Other Procedural Issues," *Public Notice* (rel.

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Commission also warned applicants that "[f]ailure to deliver the upfront payment by the March 1, 1999 deadline [would] result in dismissal of the application and disqualification from participation in the auction."⁵

MEC states that its principal was out of the office when the Commission released guidelines for resubmitting incomplete short form applications (FCC Form 175) in Auction No. 22.⁶ MEC argues that during a phone conversation with a co-worker concerning the status of its application, MEC's principal became confused and concluded that the upfront payment was due on March 3, 1999, the deadline for resubmission of the short-form applications.⁷ MEC notes that in previous auctions, upfront payments were due on the same day as resubmissions.⁸ MEC states that its principal discovered his error on March 3, 1999, and immediately wired the payment to the Mellon Bank.⁹ MEC claims that no other applicant would be unduly prejudiced by acceptance of its late upfront payment, and strict application of the Commission's deadline in this case would eliminate a qualified bidder from the auction process.¹⁰ Moreover, MEC notes that it has previously demonstrated its ability to pay the Commission's fees with regard to E block broadband PCS license BTA 033 (Battle Creek, Michigan).¹¹

On the basis of the record before us, we are not persuaded that MEC has demonstrated that application of the deadline in its case would undercut or frustrate its purpose, nor do we find that MEC presented unique circumstances sufficient to justify grant of its waiver request. The Commission's

January 21, 1999) and "Supplement to Attachment B; Auction of C, D, E, and F Block Broadband PCS Licenses; Notice and Filing Requirements for Auction C, D, E, and F Block Broadband Personal Communications Services Licenses Scheduled for March 23, 1999; Minimum Opening Bids and Other Procedural Issues," *Public Notice*, DA 99-302 (rel. February 8, 1999). *See also* FCC Auction, "C, D, E & F Broadband PCS Auction BTA -- Basic Trading Area, March 23, 1999," *Bidder Information Package*, at Tab B, p. 111.

⁵ *Id.*

⁶ *Request* at 2; *See also* "Auction of C, D, E, and F Block Broadband PCS Licenses; Status of Applications to Participate in the Auction; Clarification of Payment Issue Relating to Licenses Subject to Pending Proceedings," *Public Notice*, DA 99-375 (rel. Feb. 24, 1999) ("*Status of Applications Public Notice*").

⁷ *Request* at 2.

⁸ *Id.* at 3, *citing* "Auction of Broadband Personal Communications Service (D, E and F Blocks) -- Status of Applications to Participate in Auction," *Public Notice*, DA 96-1235 (rel. Aug. 6, 1996). *But see* "Auction of Local Multipoint Distribution Service (LMDS) Licenses; Status of Applications to Participate in Auction," *Public Notice*, DA 98-141 (rel. Jan. 27, 1998).

⁹ *Request* at 2.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 2.

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Rules, its Public Notices and the *Bidder Information Package* provided comprehensive notice of filing and payment procedures for Auction No. 22.¹² An applicant is responsible for knowing and understanding the rules applicable to the auction in which it intends to participate. Allowing different deadlines for participants prejudices those applicants that follow the auction procedures, and the Commission's Rules are best served by applying deadlines in a fair and consistent manner. Accordingly, we are not convinced that a grant of the waiver is warranted or would be in the public interest.

Therefore, MEC's request for a waiver of the upfront payment deadline is denied. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's Rules.¹³

Sincerely,

Amy J. Zoslov
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

¹² See footnote 2, *supra*.

¹³ 47 C.F.R. § 0.331.