



Federal Communications Commission
Washington, D.C. 20554

July 8, 2010

DA 10-1270

Mr. Lee G. Petro
Fletcher, Heald & Hildreth, PLC
11th Floor
1300 North 17th Street
Arlington, VA 22209

Re: Four Corners Broadcasting, LLC – Request for Waiver of Section 1.2106(a), Closed
Broadcast Auction 88

Dear Mr. Petro:

This letter denies the request of Four Corners Broadcasting, LLC (Four Corners) submitted on June 28, 2010, for a waiver of the upfront payment deadline for the upcoming closed auction of broadcast construction permits (Auction 88).¹

Four Corners, an applicant for an FM radio station construction permit in Durango, Colorado, timely filed a short-form application (Form 175) seeking to participate in Auction 88 to acquire the Durango permit.² This short-form application, as initially submitted, was determined to be incomplete and Four Corners was provided an opportunity to address the deficiencies and resubmit its application by 6:00 p.m. Eastern Time (ET) on June 17, 2010.³ Following discussion with Commission staff concerning deficiencies in its application, Four Corners revised and resubmitted its application on June 17, 2010, prior to the 6:00 p.m. deadline for making corrections to incomplete applications.

Pursuant to section 1.2106(a) of the Commission's rules,⁴ the Wireless Telecommunications and Media Bureaus (the Bureaus) had established a deadline of 6:00 p.m. ET on June 17, 2010, for submission of upfront payments for applicants seeking to participate in Auction 88. 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.⁵ In so doing, the Bureaus emphasized that each applicant was responsible for obtaining confirmation from its financial institution that the Commission's bank "timely received its upfront

¹ Four Corners Broadcasting, LLC Expedited Action Requested – Request for Waiver, submitted June 28, 2010 (Waiver Request).

² See Closed Auction of Broadcast Construction Permits; Status of Short-Form Applications to Participate in Auction 88; Upfront Payments and Corrective Amendments Due by June 17, 2010; Removal of Two Construction Permits From the Auction, DA 10-1009, *Public Notice* (WTB/MB rel. June 7, 2010) (*Auction 88 Status Public Notice*).

³ See *id.*; see also 47 C.F.R. § 1.2105(b)(2) (limited opportunity to cure short-form application deficiencies).

⁴ Section 1.2106(a) authorizes the Bureaus to establish an upfront payment deadline for an auction by Public Notice. 47 C.F.R. § 1.2106(a).

⁵ 47 C.F.R. § 1.2106(c). See Closed Auction of Broadcast Construction Permits Scheduled for July 20, 2010; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 88, *Public Notice*, 25 FCC Rcd 2942, 2969 ¶ 98 (WTB/MB 2010) (*Auction 88 Procedures Public Notice*).

payment and deposited it in the proper account.”⁶ Each applicant was also required to fax to the Commission’s bank an FCC remittance form (Form 159) prior to submitting its upfront payment wire transfer.⁷ The Commission has repeatedly cautioned auction applicants regarding the importance of planning ahead to account for unforeseen last-minute problems. In particular, Auction 88 applicants were warned to avoid untimely payments by discussing arrangements with their bank well in advance of the deadline, and to leave sufficient time to avoid any problems.⁸ Moreover, the Bureaus 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.”⁹ Four Corners failed to submit an upfront payment before the deadline.

In its Waiver Request, Four Corners claimed its late payment was due to “a bank error completely out of the control of Four Corners.”¹⁰ Four Corners asserts that it “was diligent in attempting to receive confirmation that the wire was sent” on the day of the payment deadline and that the cancellation of a wire transfer order was due to a “miscommunication” between its brokerage firm, Neuberger Berman Group LLC (Neuberger) and JP Morgan Clearing Corporation (JP Morgan), which acted as custodian of funds and assets managed by Neuberger.¹¹ In addition, Four Corners argues that the grant of a waiver would serve the public interest and would not undermine the purpose of Section 1.2106.¹²

Four Corners provides three declarations in support of its Waiver Request.¹³ Mr. Holmes, Regional Manager of applicant Four Corners, states that on the day of the deadline he submitted a corrective amendment to Four Corners’s short-form application and “immediately thereafter” forwarded to Allen Brill, the Chief Executive Officer of Four Corners, the necessary wire transfer instructions that were to be provided to Neuberger.¹⁴ Mr. Holmes states that he subsequently “received confirmation from Ms. Sommers [an employee of Neuberger] that the wire was sent,” and that he continued to “follow[] up with Ms. Sommers via telephone and email correspondence several times during the afternoon of June 17, 2010, to obtain the federal reference number associated with the wire transfer.”¹⁵ Mr. Holmes also asserts that, in his last communication with Ms. Sommers on June 17, which took place at 4:55 p.m. ET, Ms. Sommers “informed [him] that Neuberger was still waiting for the federal reference number” and that she intended to forward the number to him “as soon as she heard from JP Morgan.”¹⁶ Mr. Holmes had no further communication with her that day.¹⁷

⁶ *Auction 88 Procedures Public Notice*, 25 FCC Rcd at 2790 ¶ 100.

⁷ *See Auction 88 Procedures Public Notice*, 25 FCC Rcd at 2970 ¶¶ 100 and 102.

⁸ “To avoid untimely payments, applicants should discuss arrangements (including bank closing schedules) with their bankers several days before they plan to make the wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline.” *Auction 88 Procedures Public Notice*, 25 FCC Rcd at 2969 ¶ 99.

⁹ *Id.*, 25 FCC Rcd at 2970 ¶ 101. *See also* 47 C.F.R. § 1.2106(c).

¹⁰ Waiver Request at 7.

¹¹ Waiver Request at 2, 3 and 6.

¹² Waiver Request at 6.

¹³ *See* Declarations of Ward Holmes, Margaret Sommers and Joseph J. Triarsi, Waiver Request, Exhibits A – C.

¹⁴ Waiver Request at 5, and Declaration of Ward Holmes.

¹⁵ Declaration of Ward Holmes. A federal reference number is generated when funds have been released from the payor’s bank into the Federal Reserve System.

¹⁶ Declaration of Ward Holmes.

¹⁷ *Id.*

Margaret Sommers, a Neuberger employee, avers that she faxed the required FCC remittance form to U.S. Bank at 11:11 a.m. and entered into Neuberger's software the wire instructions at 12:04 p.m. ET on June 17, 2010.¹⁸ She states that she contacted another Neuberger employee "three or more" times that afternoon "to obtain the federal reference number to confirm that the wire transfer was sent," but did not receive this number before the close of business on that day.¹⁹ She declares that she learned on the following day that "the wire transfer was not sent on June 17, 2010, and immediately informed" Neuberger's Operations Manager who initiated the transfer at 8:45 a.m. on June 18, 2010.²⁰

Joseph Triarsi, a Managing Director of JP Morgan, states that the wire transfer instructions "were accurate and were submitted with substantially more than ample time required to ensure that a wire transfer would be sent and received by U.S. Bank by 6:00 pm EDT on June 17, 2010."²¹ Mr. Triarsi asserts that sufficient funds were available for the wire transfer, and that "under normal circumstances, the wire transfer should have been sent almost instantaneously after the wire transfer instructions were entered in JP Morgan's software by Neuberger."²² Mr. Triarsi states that "[d]ue to a miscommunication between JP Morgan's staff and Neuberger Bermans's staff after the wire transfer request was sent to JP Morgan by Neuberger Berman, the wire transfer was cancelled at such a time that it was impossible for a new wire transfer to be initiated on June 17, 2010."²³ Mr. Triarsi states that JP Morgan sent a wire transfer to the Commission's bank at 8:55 a.m. on the following day "to remedy this error" and, after that payment was returned, resent the wire transfer late that afternoon, which was returned by the Commission's bank on June 22, 2010.²⁴

Four Corners notes that the Commission may grant a waiver of its rules pursuant to section 1.925 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.²⁵

In light of the public interest in predictable and consistent application of the Commission's auction rules and procedures, we deny Four Corners's Waiver Request. Four Corners does not explain how the purpose of the rule would not be served or would be frustrated by applying the deadline in these circumstances. Nor does Four Corners demonstrate circumstances that would make application of the deadline contrary to the public interest. We have previously observed that the upfront payment deadline is set at a point in the auction process that will allow the timely announcement of qualified bidders, both to enable qualified bidders sufficient time to finalize their bidding plans and to provide the Commission

¹⁸ Waiver Request at 5; Declaration of Margaret Sommers.

¹⁹ *Id.*.

²⁰ Declaration of Margaret Sommers

²¹ Declaration of Joseph J. Triarsi.

²² *Id.*

²³ *Id.*

²⁴ Declaration of Joseph J. Triarsi.

²⁵ 47 C.F.R. § 1.925. *See also* Waiver Request at 1, 3 (citing 47 C.F.R. § 1.925). We note that the waiver standards of section 1.925, applied in the context of wireless proceedings, and section 1.3, applied in the context of broadcast services, are substantially the same. *See* Application of Delta Radio, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 16889, 16891 ¶ 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).

with sufficient time to complete preparations to enable the bidding to begin as announced.²⁶ The amount of an upfront payment determines each applicant's initial bidding eligibility in the auction.²⁷ 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.²⁸ In the absence of a showing that Four Corners is entitled to a waiver, acceptance of late payments in these circumstances would be unfair to those bidders who have met the deadline and could disrupt our ability to conduct this and future auctions as scheduled.

We are not persuaded by Four Corners's claims that it "took all possible steps to ensure that the upfront payment would be wired to the Commission on a timely basis" and that "the delay was entirely the result of a bank error completely out of the control of Four Corners."²⁹ Four Corners has not shown that enforcement of the deadline would be inequitable, unduly burdensome or contrary to the public interest under the circumstances it presents. Indeed, the circumstances presented by Four Corners do not meet the standard of diligence established in the upfront payment waiver cases it cites. Accordingly, applying the deadline to Four Corners serves the underlying purpose of the upfront payment rule as well as the public interest in maintaining the integrity of the auction process and the auction schedule.

Contrary to Four Corners's claims, its efforts do not show that it had "performed sufficient due diligence to overcome any error in the submission of its payment," as did the applicant in *Charytan*.³⁰ In *Charytan*, the applicant discussed its wire transfer arrangements with its own bank five days before the day of the deadline and again on the day of the wire transfer.³¹ Four Corners does not present any evidence that it discussed arrangements or engaged in any planning with Neuberger and/or JP Morgan prior to June 17, 2010, though it asserts that "the entry of wiring instructions into [Neuberger's] software at 12:04 PM EDT routinely results in JP Morgan having more than enough time to initiate a wire transfer from accounts with sufficient funds."³² The applicant in *Charytan* continued to check on the status of the wire transfer, leading to its discovery of a problem prior to the payment deadline and its immediate efforts to remedy the problem.³³ While the applicant in *Charytan*, like Four Corners in the present case, "left little time ... to reasonably react to unexpected contingencies that periodically arise during the wire

²⁶ See Letter to David G. O'Neil, Esq. from Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, 23 FCC Rcd 4765 (Auc. Div. 2008) (*O'Neil*). Following the Auction 88 upfront payment deadline, the Bureaus also need to complete application review and announce which applicants are qualified to bid, communicate with those applicants, and make other preparations for the start of the bidding.

²⁷ See *Auction 88 Procedures Public Notice*, 25 FCC Rcd at 2970-72 ¶¶ 105-107. The Commission established the upfront payment requirement "[t]o ensure that only serious, qualified bidders participate in our auctions" Implementation of Section 309*(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, Second Report and Order, FCC 94-61, 9 FCC Rcd 2348, 2377 ¶ 169 (1994).

²⁸ *Auction 88 Procedures Public Notice*, 25 FCC Rcd at 2973 ¶ 110.

²⁹ See Waiver Request at 7.

³⁰ Waiver Request at 3-5, citing Letter to Ms. Lynn R. Charytan from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 15 FCC Rcd 24,540 (Auc. Div. 2000) (*Charytan*) (granting waiver request where bank employee's last minute action prior to deadline interfered with submission, notwithstanding repeated efforts by applicant to effect upfront payment submission).

³¹ *Charytan*, 15 FCC Rcd at 24542.

³² Waiver Request at 5; see *Auction 88 Procedures Public Notice*, 25 FCC Rcd at 2969 ¶ 99 ("To avoid untimely payments, applicants should discuss arrangements (including bank closing schedules) with their bankers several days before they plan to make the wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline.").

³³ *Charytan*, 15 FCC Rcd at 24542.

transfer process,”³⁴ we were persuaded that the applicant in *Charytan* had “performed sufficient due diligence to overcome any error in the submission of its payment” because the applicant was attentive and undertook corrective efforts immediately upon discovering the wire transfer problem just prior to the payment deadline, including immediate notification to Commission staff of the problem.³⁵

In the instant case, we find that Four Corners has not shown the same level of diligence. Mr. Holmes and Ms. Sommers each state that they waited for, but never received on the due date a federal reference number that would have confirmed that a wire transfer had been sent.³⁶ Yet, despite the failure to receive confirmation, Four Corners does not identify any steps it took to ensure that the payment was completed prior to the deadline.³⁷ Nor did they call Commission staff to seek confirmation that the payment had been received and credited to the proper account by the deadline. Four Corners apparently made no effort to follow through with others at Neuberger, JP Morgan or the Commission after Ms. Sommers told Mr. Holmes over an hour before the payment deadline that she had been unable to obtain a federal reference number. Such inaction indicates something well short of due diligence and therefore, we cannot agree with Four Corners’ assertion that it “took all possible steps” to ensure that it submitted its upfront payment by the deadline.

While Four Corners asserts that “Neuberger Berman diligently followed up with JP Morgan,” the supporting declarations of Ms. Sommers and Mr. Triarsi only raise questions as to Four Corners’ diligence in the absence of confirmation that the wire transfer had been completed by the deadline. Ms. Sommers, the Neuberger employee, declares that she contacted a fellow Neuberger employee on “three or more occasions after the wiring instructions were entered ... to obtain the federal reference number” before acknowledging that she did not receive the sought-after confirmation number before the close of business that day.³⁸ Finally, the declaration of Mr. Triarsi, a Managing Director of JP Morgan, explains only that there was an unspecified “miscommunication” between JP Morgan and Neuberger that caused the wire transfer request to be “cancelled at such a time that it was impossible for a new wire transfer to be initiated on June 17, 2010.”³⁹ Mr. Triarsi further states that JP Morgan did not “communicate with Mr. Brill, the account holder regarding the wire transfer instruction request received from Neuberger.”⁴⁰ Thus, Four Corners provides no information on the precise timing or nature of the miscommunication, how it was discovered and whether any additional steps were taken to meet the deadline, or why it was impossible to initiate another wire transfer on June 17, 2010. In short, Four Corners fails to provide specific information from which we might conclude that it exercised the degree of diligence shown by the applicant in *Charytan* in attempting to meet the upfront payment deadline.

Similarly, we do not agree that Four Corners has demonstrated the level of diligence shown by the applicants in *Shannon* and *Leibman*.⁴¹ In *Shannon*, the applicant was attentive to the payment process,

³⁴ *Id.*

³⁵ *Id.*, 15 FCC Rcd at 24542-43.

³⁶ See Declarations of Ward Holmes and Margaret Sommers. Mr. Holmes explains that he had not received the federal reference number by the time of his last communication with Ms. Sommers, which occurred over one hour prior to the 6:00 p.m. payment deadline. Declaration of Ward Holmes.

³⁷ Compare Letter to Patrick Shannon, Esq. from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 18 FCC Rcd 11,552 (Auc. Div. 2003) (*Shannon*).

³⁸ See Declaration of Margaret Sommers.

³⁹ Declaration of Joseph J. Triarsi.

⁴⁰ *Id.*

⁴¹ *Shannon*, 18 FCC Rcd at 11,552; Letter to Sara F. Leibman, Esq., from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 18 FCC Rcd 9721 (Auc. Div. 2003) (*Leibman*).

causing it to learn before the deadline had passed that the Commission's bank had returned its payment; it was thus able to take immediate steps beginning before the upfront payment deadline to rectify the bank's error. In *Leibman*, we found that the applicant had exercised reasonable diligence by ensuring that sufficient funds were on deposit and available for transfer to the Commission's bank three days before the planned transfer, that the funds were received by the Commission's bank prior to the deadline, that there was no indication for a number of hours that the funds had been rejected, and that the law firm took immediate steps on the following business day to ensure successful completion of the payment.⁴² Significantly, Four Corners waited until it finished making corrections to its incomplete application before initiating its upfront payment.⁴³ The delay by Four Corners in initiating payment until late on the morning of June 17, 2010 fails to demonstrate even ordinary due diligence, particularly in light of its use of a multi-step process that appears to have involved a number of different individuals and two financial institutions.⁴⁴ We are simply unable to conclude, based on the record before us, that Four Corners has shown a level of diligence comparable to the applicants in *Shannon* and *Leibman*.

Four Corners asserts that a showing of sufficient funds in the sender's account merits a waiver, citing the *Hayes-Bell* and *Charytan* decisions. We disagree with that reading of those decisions. Four Corners fails to note that the Bureau in *Hayes-Bell* was also persuaded by the applicant's diligence in presenting wire transfer instructions to the bank four days in advance of the upfront payment deadline, finding that the applicant's circumstances were distinguishable from another case in which an applicant did not initiate its wire transfer until the day of the payment deadline.⁴⁵ Likewise, the *Charytan* case did not turn on the sufficiency of the applicant's funds but rather on the applicant's attentiveness to the payment process and its diligent efforts, upon learning of a problem, in contacting senior officials at the bank prior to the payment deadline to resume the wire transfer, which had been suspended by a bank supervisor.⁴⁶ Four Corners failed to demonstrate the diligence shown by the applicants in those cases.

Four Corners provides little basis for us to agree with its conclusion that "Four Corners took all possible steps to ensure that the payment would be wired to the Commission on a timely basis...."⁴⁷ In light of the public interest in predictable and consistent application of auction rules and deadlines, we hereby deny the waiver request filed by Four Corners Broadcasting, LLC.

⁴² *Id.*

⁴³ Declaration of Ward Holmes. Although Four Corners claims that "Mr. Brill forwarded wiring instructions to Neuberger Berman at 8:45 AM EDT on June 17, 2010" (Waiver Request at 5, emphasis added), this claim is inconsistent with Mr. Holmes's sworn statement that he provided wire transfer instruction to Mr. Brill only after submitting an amendment to its short-form application. The Commission's Auctions System database indicates that Four Corners entered its last corrective amendment and resubmitted its short-form application at 10:46 a.m. ET on June 17, 2010.

⁴⁴ In this regard, we view the Four Corners efforts to be similar to those in *O'Neil* where we found that the applicant had "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." See *O'Neil*, 23 FCC Rcd at 4765. While the applicant in *O'Neil* initiated its payment transaction the day prior to the upfront payment deadline for that auction, the payment process that it chose to employ involved multiple steps and different bank branch offices. Four Corners also chose to employ a multiple-step procedure, which involved coordination of a minimum of four individuals at Four Corners, Neuberger and JP Morgan. The decision by Four Corners to wait until after 10:46 a.m. ET on the date the payment was due to initiate its payment provided little room for error.

⁴⁵ Application of Ramona Lee Hayes-Bell, *Memorandum Opinion and Order*, 15 FCC Rcd 14729, 14732-33 ¶ 9 (WTB 2000) (*Hayes-Bell*).

⁴⁶ *Charytan*, 15 FCC Rcd at 24,540.

⁴⁷ Waiver Request at 7.

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This action is taken pursuant to delegated authority under section 0.331 of the Commission's rules.⁴⁸

Sincerely,

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

⁴⁸ 47 C.F.R. § 0.331.