

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

LETTER
January 22, 1996

Released: February 5, 1996

Mr. Clark J. Gebman
NYNET, Inc.
One Penn Plaza
Suite 3515
New York, NY 10119-3599

Dear Mr. Gebman:

This letter responds to the waiver request filed by NYNET, Inc. ("NYNET") as part of its short-form application to participate in the Direct Broadcast Satellite ("DBS") auction to be held on January 24, 1996. NYNET makes the following three requests: First, NYNET requests a waiver of the upfront payment obligation as a condition of participation in the auction. Second, NYNET requests a delay of the down payment deadline for the winning bidder by at least as many days as the government was closed during the recent shutdown. Third, NYNET requests that the "designated entity rules apply in the case of this application." In the event that the Commission denies NYNET's waiver request, NYNET asks the Commission to postpone the auction "until such time as the public can prepare a response that is appropriate."

Waiver of a Commission rule is appropriate only if (1) the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and grant of the waiver is otherwise in the public interest, or (2) unique facts and circumstances render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, and there is no reasonable alternative. *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). NYNET's waiver request fails to satisfy either aspect of the waiver standard.

Pursuant to Section 309(j)(5) of the Communications Act of 1934, the Commission must not allow any bidder to participate in a spectrum auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing." 47 U.S.C. § 309 (j)(5). The Commission has required upfront payments in all of its spectrum auctions, including those reserved for designated entities, to ensure that only serious, qualified bidders participate. *See, e.g., "FCC Issues New Procedures, Terms and Conditions for Broadband PCS C Block Auction," Public Notice*, p. 7 (rel. October 6, 1995) and 47 C.F.R. § 1.2106(a). NYNET argues that the requirement of an upfront payment is "highly biased and regressive" and creates "barriers to meaningful American telecommunications progress." We disagree. The underlying purpose of this requirement has been served by ensuring that only serious, qualified bidders participate in the Commission's spectrum auctions. NYNET's request fails to demonstrate

how the underlying purpose of the upfront payment obligation is not served, or would be frustrated, in its case. NYNET has also failed to show that unique facts and circumstances render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that there is a reasonable alternative. In fact, the harm to the qualified bidders, who complied with the upfront payment obligation, could be substantial if we were to grant NYNET's request. There is also no precedent for granting a waiver of the upfront payment obligation.

Because NYNET failed to submit a timely upfront payment, it was deemed unqualified to participate in the DBS auction pursuant to Commission rules. "Qualified Bidders for DBS Auction to Be Held on January 24, 1996," *Public Notice* (rel. January 22, 1996). NYNET's requests to delay the down payment deadline and apply the designated entity rules to its application are therefore moot. Finally, NYNET has failed to demonstrate that a postponement of the DBS auction is in the public interest. Because a delay of the auction could cause substantial harm to the qualified bidders, NYNET's request to postpone the auction is also denied. Another such request filed by the NYNEX Corporation was recently denied. Letter to C.R. Carrington from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, DA 96-30, January 17, 1996.

For the reasons stated above, NYNET's request IS HEREBY DENIED.

Sincerely,

Kathleen O'Brien Ham
Chief, Auctions Division
Wireless Telecommunications Bureau

cc: Rebecca M. Gebman,
President
NYNET, Inc.