



Federal Communications Commission
Washington, D.C. 20554

DA 01-1319
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Re: Request for Temporary Waiver of Installment
Payment Due Date

Dear Messrs. Fox and Taylor:

This letter responds to the Petition filed on behalf of Capital Two-Way Communications, Inc. ("petitioner") requesting that the Auctions and Industry Analysis Division waive the Commission's installment payment rules.¹ In the alternative, the Petition requests a grace period pursuant to the installment payment rules that were in effect at the time the two licenses were awarded to Capital Two-Way Communications, Inc. and Everest Communications, Inc. ("Capital/Everest").² For the reasons set forth below, we deny the Petition.

On April 16, 1996, the Commission granted Capital/Everest two 900 MHz Specialized Mobile Radio ("SMR") licenses from Auction No. 7.³ As a small business, Capital/Everest was eligible to participate in the Commission's installment payment plan for 900 MHz SMR licenses.⁴ After grant of the

¹ Petition for Waiver, Or, In The Alternative, Request For "Grace Period," filed by Capital Two-Way Communications, Inc. on Aug. 31, 1999 ("Petition").

² Petition at 1-2.

³ "FCC Prepared to Award 900 MHz MTA Licenses; Additional payment due by July 8, 1996," *Public Notice*, DA 96-1057, 11 FCC Rcd 7701 (1996). Capital/Everest won a G block license in the Dallas, Texas market, YSM007G, call sign KNNY226 ("Dallas license") with a net bid of \$843,000 and won a T block license in the San Antonio, Texas market, YSM033T, call sign KNNY227 ("San Antonio license") with a net bid of \$468,363.

⁴ 47 C.F.R. §§ 90.812 and 1.2110(f) (1996). A promissory note and a security agreement was executed for each of the two 900 MHz SMR licenses. Each promissory note included a schedule of 40 quarterly installment payments commencing November 1996 and concluding August 2006. Security Agreement (Specialized Mobile Radio: Auction Event No. 7), License No. YSM007G, (August 21, 1996) ("Dallas Security Agreement"); Installment Payment Plan Note (Specialized Mobile Radio: Auction Event No. 7 – Installment Plan B), License No. YSM007G, (August 21, 1996) ("Dallas Installment Payment Note"); Security Agreement (Specialized Mobile Radio: Auction Event No. 7), License No. YSM033T, (August 21, 1996) ("San Antonio Security Agreement");

licenses, only seven installment payments were made on each license. On December 1, 1998, the last such payment was made when the Commission received the May 31, 1998 installment payment for each license. After that date, the no additional payments were made on either of the licenses.

The Commission's installment payment rules in effect after March 16, 1998 provided that if a licensee did not make full and timely payment of an installment, a 90-day non-delinquency period was automatically granted.⁵ This was immediately followed by an automatic 90-day grace period if full payment was not made during the non-delinquency period.⁶ Licenses automatically cancelled once this 180-day period had elapsed.⁷ Thus, under the installment payment rules in effect, the licenses cancelled automatically for failure to make full and timely payment.

Nine months after the last payment was made on the licenses, and after the licenses had automatically cancelled, the instant Petition was filed.⁸ Petitioner argues that a waiver should be granted because service to the public would be delayed by a future auction of licenses for the same spectrum,⁹ and because an assignment application is pending that would assign the licenses to an entity with the financial means to make the installment payments.¹⁰ For a waiver of the Commission's rules to be granted, one of two tests must be met. The entity requesting the waiver must demonstrate either that: (1) the underlying purpose of the rules 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, (2) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹¹ As we explain below, the instant Petition failed to establish grounds for a waiver.

The Petition fails to establish that the underlying purpose of the Commission's rules would not be served by their application in this instance. The argument that grant of this waiver would speed service to the public ignores the fact that grant of such a waiver would undermine the auction and licensing process.

Installment Payment Plan Note (Specialized Mobile Radio: Auction Event No. 7 – Installment Plan B), License No. YSM033T, (August 21, 1996) (“San Antonio Installment Payment Note”).

⁵ 47 C.F.R. § 1.2110(e)(4)(i) (1996). The Part 1 rules referenced in this letter have been amended to reflect the use of quarters for implementation of the Commission's payment deadlines and attendant grace period rules. Amendment of Part 1 of the Commission's Rules-Competitive Bidding Procedures, WT Docket 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and the Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 15293, 15 FCC Rcd 21520 (2000) (“*Part 1 Third Report and Order Recon*”). These changes have no effect on our evaluation of the Petition.

⁶ 47 C.F.R. § 1.2110(e)(4)(ii) (1996).

⁷ 47 C.F.R. § 1.2110(e)(4)(iv) (1996).

⁸ Petition.

⁹ Petition at 3.

¹⁰ Petition at 2-3.

¹¹ 47 C.F.R. § 1.925.

The licenses were conditioned upon the full and timely performance of the payment obligations,¹² which the licensee failed to fulfill. The Commission has repeatedly emphasized the importance of full and timely payment.¹³ Strict enforcement of payment rules enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial capacity and that spectrum is awarded to those qualified bidders who value the spectrum most. Moreover, the Commission has held that the ability to make installment payments is evidence of a licensee's ability to access the capital necessary to both pay for the license and provide service to the public.¹⁴ Insisting that licensees demonstrate their ability to pay as a condition to holding licenses is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won licenses in the auctions and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace.¹⁵

Turning to the second part of the waiver standard, there is nothing unique or unusual presented by the Petition.¹⁶ The representation that a pending license assignment would put the licenses in the hands of a third party with the means to make payments is unremarkable. The Commission's rules require that the licensee make timely and full payment on its licenses.¹⁷ The existence of a potential assignee does not negate the licensee's failure to comply with the Commission's rules. Thus, the Petition does not provide a basis for a grant of a waiver of the Commission's installment payment rules.

¹² 47 C.F.R. § 90.812(a) (1996) ("An MTA license issued to an eligible small business that elects installment payments will be conditioned on the full and timely performance of the license holder's quarterly payments."); *see also* Dallas Security Agreement at ¶ 2 ("The debtor recognizes that its continued retention of the License, and rights to operate as a Commission licensee thereunder, is conditioned upon compliance with all orders and regulations applicable to the Licensee and the Communications Act of 1934, as amended"); San Antonio Security Agreement at ¶ 2 (contains the same language as in the Dallas Security Agreement).

¹³ *See, e.g.*, In the Matter of Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA, *Memorandum Opinion & Order*, FCC 00-433 at ¶ 15 (rel. Dec. 21, 2000) ("*Southern MO&O*"); In the Matter of Licenses of 21st Century Telesis, Inc. For Facilities in the Broadband Personal Communications Services, *Memorandum Opinion & Order*, FCC 00-434 at ¶ 10 (rel. Dec. 21, 2000) ("*21st Century MO&O*"); In the Matter of Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses NextWave Personal Communications, Inc. and NextWave Power Partners, Inc., Petition for Reconsideration, In re Settlement Request Pursuant to DA 99-745 For Various Broadband PCS C Block Licenses, *Order on Reconsideration*, 15 FCC Rcd 17500 (2000) ("*NextWave Order on Reconsideration*"); "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly," *Public Notice*, DA 96-481, 11 FCC Rcd 10853 (1996) (WTB).

¹⁴ Amendment of the Commission's Rules Regarding Installment Payment Financing of Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8348 ¶8 (1998).

¹⁵ *See NextWave Order on Reconsideration*, 15 FCC Rcd 17500.

¹⁶ *See* In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22071, 22072, ¶ 4 (1998) ("The challenge of raising capital to finance ... licenses exists in varying degrees for all licensees and does not constitute 'unique facts and circumstances.'"), *petition for recon. denied*, 14 FCC Rcd 6080 (1999), *aff'd.*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999).

¹⁷ 47 C.F.R. § 1.21110(f)(4) (1996).

As an alternative argument, the petitioner contends that it should not be subject to the Commission's installment payment rules in effect when its licenses cancelled.¹⁸ Rather, the petitioner maintains that the Commission should apply the former Part 1 rules that were in effect when the licenses were granted. The Commission's former Part 1 rules provided that any licensee whose installment payment was more than ninety days past due was in default, unless the licensee properly filed a grace period request.¹⁹ In the *Part 1 Third Report and Order*, the Commission modified the installment payment grace period provisions as applied to all licensees participating in an installment payment plan at that time.²⁰ The petitioner argues that application of the modified rules ("new Part 1 rules") would constitute impermissible retroactive rulemaking.²¹ The Commission rejected this argument in the *Order on Reconsideration of the Part 1 Third Report and Order*²² and concluded that the new Part 1 rules do not violate the prohibitions on retroactivity under the Administrative Procedure Act ("APA").²³ The Petition does not provide a basis to depart from Commission precedent on this issue. Further, even under the old Part 1 rules, the waiver request, filed nine months after its last payment, was clearly untimely.

Finally, the petitioner erroneously contends that its situation is analogous to that of TE-MCG.²⁴ In *TE-MCG*, the Wireless Telecommunications Bureau recognized a constructive waiver of the Commission's rules where installment payments were accepted after the installment payment deadlines had passed.²⁵ However, in this instance, the licensee ceased making payments and did not file a request for a waiver of the Commission's rules until nine months after its last installment payment.²⁶ Thus, the factual circumstances presented here are clearly distinguishable from *TE-MCG*.

For the reasons detailed above, the instant Petition requesting a waiver of the Commission's installment payment rules, or in the alternative, requesting a grace period is DENIED.

¹⁸ Petition at 4.

¹⁹ 47 C.F.R. § 1.2110(e)(4)(ii) and (iii) (1996).

²⁰ In the Matter of Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 372, 434-42 ¶¶ 103-113 (1998).

²¹ Petition at 4-5.

²² *Part 1 Third Report and Order Recon*, 15 FCC Rcd at 15304-396 ¶¶ 18, 20-22.

²³ 5 U.S.C. § 701 *et. seq.*

²⁴ Petition at 5-6.

²⁵ Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Lloyd W. Coward, Esq., Counsel for TE-MCG Consortium, DA 99-258, 14 FCC Rcd 2173 (1999) ("*TE-MCG*").

²⁶ Petition.

Russell H. Fox, Esq. and Russ Taylor, Esq.
June 1, 2001

This action is taken pursuant to sections 1, 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309(j) and the authority delegated pursuant to section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331.

Sincerely,

Margaret Wiener
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau