



FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

DA 01-1755
July 25, 2001

Mr. Lou Ebert
Devon Mobile Communications, L. P.
275 Oak Street
Suite 235
Buffalo, NY 14203

Dear Mr. Ebert:

This letter responds to your May 3, 2001 letter on behalf of Devon Mobile Communications, L. P. ("Devon").¹ Devon requests a waiver of the five percent (5%) late payment fee it incurred with respect to its installment payment obligations on 22 broadband Personal Communications Services ("PCS") C and F block licenses.² For the reasons set forth below, we deny Devon's request for waiver.

Quarterly installment payments on Devon's eight C block and fourteen F block licenses were due to the Commission's account at Mellon Bank on January 31, 2001. Devon acknowledges that the funds for Devon's quarterly installment payments were received in the Commission's account at Mellon Bank on February 1, 2001.³ Section 1.2110(f) of the Commission's rules provides a quarterly grace period after the installment payment due date and requires a five percent (5%) late fee.⁴ In this instance, because Devon failed to pay the quarterly installment payment on January 31, 2001, it incurred a five percent (5%) late fee.

Devon contends that it missed the January 31, 2001 installment payment deadline due to an administrative error by Northwest Savings Bank ("Northwest") that resulted in a failure to wire transfer funds from Devon's account to the Commission's account at Mellon Bank.⁵ In

¹ Letter to Ms. Susan Donahue, Revenue and Receivables Group, Federal Communications Commission, from Mr. Lou Ebert, Vice President and General Manager, Devon Mobile Communications, L. P. (May 3, 2001) ("Request").

² Devon's C and F block licenses that are subject to late fees are listed in Attachment A.

³ Request at 1.

⁴ 47 C.F.R. § 1.2110(g)(4)(i) (2000). If remittance of the missed installment payment and the five percent (5%) late fee is not made before expiration of the first automatic quarterly grace period, the rule provides for a second automatic quarterly grace period and requires an additional late fee equal to ten percent of the missed payment. 47 C.F.R. § 1.2110(g)(4)(ii) (2000).

⁵ Request at 1.

particular, Devon contends that, having sufficient funds in its bank account to satisfy the installment payment, it authorized Northwest to transfer funds from its account to the Commission's account at Mellon Bank.⁶ Devon contends that its failure to timely submit its installment payment was the direct result of Northwest's failing to execute Devon's wire transfer instructions. Devon cites as support a copy of its bank account statement showing adequate funds available for the installment payment and its wire transfer instructions dated January 31, 2001.⁷ Devon alleges that a failure on the part of its bank to timely transmit its payment justifies waiver of the late fees incurred.

To obtain a waiver of the Commission's installment payment rules,⁸ Devon must 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 otherwise contrary to the public interest, or that Devon has no reasonable alternative.⁹ For the reasons discussed below, we find that the circumstances of your waiver request fail to meet the Commission's standard for granting a waiver.

Devon has not demonstrated that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case. In adopting two consecutive quarterly grace periods and requiring late payment fees from installment payment licensees that pay after the original due date, the Commission intended to provide licensees with adequate financial incentives to make installment payments on time.¹⁰ In this instance, waiver of the five percent (5%) late fee incurred would only serve to undermine the policies that support enforcement of the Commission's installment payment deadlines.

We also are not persuaded that Devon has demonstrated circumstances sufficient to justify the grant of a waiver in this case. Devon initiated processing of the wire payment on the

⁶ *Id.*

⁷ *See* Request.

⁸ 47 C.F.R. § 1.2110(f) (1998).

⁹ 47 C.F.R. § 1.925.

¹⁰ *See* Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket 97-82, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 439-440 (1997) ("*Part 1 Third Report and Order*"); 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 Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 15293, 15304-05, ¶ 19 (2000) (rejecting the argument that it is commercially unreasonable to impose the same late payment fee amount whether a payment arrives 1 day or 90 days late).

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installment payment due date,¹¹ leaving little time for it to reasonably react to unforeseen last-minute difficulties in the transmission of funds. In electing to transfer funds on the due date, Devon bore the risk of routine complications, such as an administrative error by its bank. These are not unique circumstances sufficient to justify waiver of the late fee.¹² Accordingly, Devon's request is denied.

This action is taken pursuant to Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), under authority delegated pursuant to Section 0.331 of the Commission's rules.¹³

Sincerely,

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

¹¹ *Request* at 1.

¹² *See also* In the Matter of Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Bock Licenses in the Cleveland, TN BTA, *Memorandum Opinion & Order*, FCC 00-433 at ¶ 10 (rel. December 21, 2000) (holding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule); BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd 3230, 3235 ¶ 8 (1997) (holding that the failure of a third party to perform its contractual obligation does not constitute a special circumstance justifying a waiver of the down payment default rule).

¹³ 47 C.F.R. § 0.331.