

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

In the Matter of)
Northcoast Communications, L.L.C. (F Block PCS) File No. 0000365464
License for Glenn Falls, NY (BTA 164); C Block)
PCS License for Ithaca, NY (BTA 208); C Block)
PCS License for Oneata, NY (BTA 333); C Block)
PCS License for Utica-Rome, NY (BTA 453); F)
Block PCS License for Scranton-Wilkes Barre-)
Hazeleton PA (BTA 412)))
DCC PCS, Inc. (C Block PCS License for) File No. 0000365171
Syracuse, NY (BTA438)))
MCG PCS II, Inc. (C Block PCS License for) File No. 0000365038
Watertown, NY (BTA463)))
PCS Partners, L.P. (F Block PCS License for the) File No. 0000369312
Plattsburg, NY (BTA352)))
Salmon PCS LLC (C Block PCS License for) File No. 0000365189
Danville, IL (BTA 103); C Block PCS License for)
Grand Island-Kearney, NE (BTA 167); C Block)
PCS License for Lincoln, NE (BTA 256); C Block)
PCS License for McCook, NE (BTA 270); C)
Block PCS License for North Platte, NE (BTA)
325); C Block PCS License for South Bend-)
Mishawaka, IN (BTA 424); F Block PCS License)
for Hastings, NE (BTA 185); F Block PCS)
License for Elkhart, IN (BTA 126); F Block PCS)
License for Michigan City-La Porte, IN (BTA)
294)))
Summit Wireless, L.L.C. (C Block PCS License) File No. 0000365137
for Jackson, MS (BTA 210)))

ORDER

Adopted: August 17, 2001

Released: August 21, 2001

By the Deputy Chief, Policy and Rules Branch, Wireless Division, Wireless Telecommunications Bureau:

I. Introduction

1. This Order addresses six substantively-identical Petitions to Deny (“Petitions”), which were filed jointly by 21st Century Telesis Joint Venture and 21st Century Bidding Corp. (collectively, “21st Century”) on March 9, 2001 against the above-captioned applications of winning bidders in the C and F block broadband Personal Communications Services (“PCS”) auction (“Auction No. 35”). In its Petitions, 21st Century requests that we deny or defer granting these applications until the Commission resolves 21st Century’s pending Further Reconsideration Petition concerning the automatic cancellation of its licenses.¹ For the reasons set forth below, we dismiss 21st Century’s Petitions for lack of standing. We will, however, condition any grant of the above-captioned applications upon the outcome of 21st Century’s Further Reconsideration Petition.

II. Background

2. 21st Century won the licenses that are the subject of its Petitions in the Broadband PCS C Block Auction (“Auction No. 5”) and the Broadband PCS D, E, and F Block Auction (“Auction No. 11”).² After meeting its initial obligations, 21st Century failed to make the required installment payments, resulting in the automatic cancellation of its licenses on January 28, 2000. 21st Century subsequently filed letters with the Commission requesting waiver of the Commission’s installment payment rules.³ On August 7, 2000, the Wireless Telecommunications Bureau (“Bureau”), Auctions and Industry Analysis Division (“Division”) denied 21st Century’s requests.⁴ On September 6, 2000, 21st Century sought reconsideration of the *Division Order*.⁵ Also on September 6, 2000, the Wireless Telecommunications Bureau released a Public Notice concerning the auction of C and F block PCS licenses in Auction No. 35.⁶ This Public Notice listed the licenses to be auctioned, including licenses for

¹ In Re Licenses of 21st Century Telesis Joint Venture and 21st Century Bidding Corp. For Facilities in the Broadband Personal Communications Services in the C and F Blocks, Petition for Reconsideration (filed Jan. 22, 2001) (“Further Reconsideration Petition”).

² See “Entrepreneur’s C Block Auction Closes: FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas,” *Public Notice*, DA 96-716 (rel. May 8, 1996); “D, E, and F Block Auction Closes—Winning Bidders in the Auction of 1,479 Licenses To Provide Broadband PCS in Basic Trading Areas,” *Public Notice*, DA 97-81 (rel. Jan. 15, 1997).

³ Letter from James A. LaBelle, Chairman and Chief Executive Officer, 21st Century Telesis, Inc., to Magalie Roman Salas (Feb. 2, 2000); Letter from James A. LaBelle, Chairman and Chief Executive Officer, 21st Century Telesis, Inc., to Magalie Roman Salas (Apr. 25, 2000); Letter from James A. LaBelle, Chairman and Chief Executive Officer, 21st Century Telesis, Inc., to Magalie Roman Salas (July 25, 2000).

⁴ Letter from Louis Sigalos, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to James M. LaBelle, Chairman and Chief Executive Order, 21st Century Telesis, Inc., DA 00-1791 (rel. Aug. 7, 2000), at 1 (“*Division Order*”).

⁵ In Re Licenses of 21st Century Telesis, Inc. For Facilities in the Broadband Personal Communications Systems in the C and F Blocks, Petition for Reconsideration (filed Sept. 6, 2000) (“Reconsideration Petition”).

⁶ “C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000,” *Public Notice*, 15 FCC Rcd 17,251 (2000). Auction No. 35 began on December 12, 2000 and concluded on January 26, 2001. See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced; Down Payments Due February 12, 2001, FCC Forms 601 and 602 Due February 12, 2001; Ten-Day Petition to Deny Period,” *Public Notice*, DA 01-211 (rel. Jan. 29, 2001).

spectrum on which 21st Century was previously licensed to operate.⁷ On October 16, 2000, 21st Century requested a stay of Auction No. 35.⁸ On November 9, 2000, 21st Century filed a Motion for Leave to File Supplement to Petition for Reconsideration⁹ and a Supplement to Petition for Reconsideration¹⁰ with respect to its then-pending Reconsideration Petition. On December 21, 2000, the Commission released its *Memorandum Opinion and Order*, which affirmed the *Division Order*, denied the Motion on the ground that the Supplement was untimely, and declined to address the arguments in the Supplement.¹¹ On the same day, the Bureau released an *Order* denying 21st Century's request for a stay.¹² On January 22, 2001, 21st Century filed a Further Reconsideration Petition,¹³ seeking reconsideration of the Commission's *Memorandum Opinion and Order*.

3. The above-captioned winning bidders in Auction No. 35 submitted long-form license applications on February 12, 2001. 21st Century filed the subject Petitions on March 9, 2001, asking the Commission to deny or defer these applications until after the final resolution of 21st Century's Further Reconsideration Petition. A number of applicants filed Oppositions and Responses on March 16, 2001.¹⁴ 21st Century filed Replies on March 23 and March 26, 2001.¹⁵

III. Discussion

4. 21st Century argues that the Commission should deny or defer the above-captioned applications until 21st Century's Further Reconsideration Petition before the Commission is resolved.¹⁶ As an initial matter, 21st Century has failed to establish standing to challenge the instant applications by demonstrating that it is a "party in interest,"¹⁷ because it has not set forth specific allegations of fact

⁷ See "C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000," *Public Notice*, 15 FCC Rcd 17,251 (2000).

⁸ Request for Stay, filed by Thomas Gutierrez and Todd Slamowitz, attorneys for 21st Century, on October 16, 2000.

⁹ In Re Licenses of 21st Century Telesis, Inc. For Facilities in the Broadband Personal Communications Service in the C and F Blocks, Motion for Leave to File Supplement to Petition for Reconsideration (filed Nov. 9, 2000) ("Motion").

¹⁰ In Re Licenses of 21st Century Telesis, Inc. For Facilities in the Broadband Personal Communications Service in the C and F Blocks, Supplement to Petition for Reconsideration (filed Nov. 9, 2000) ("Supplement").

¹¹ Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, FCC 00-434 (rel. Dec. 21, 2000) ("*21st Century MO&O*").

¹² 21st Century Telesis, Inc., Request for Partial Reconsideration of Public Notice DA 00-2038, Request for Stay of Public Notice DA 00-2038, *Order*, DA 00-2889 (rel. Dec. 21, 2000).

¹³ *Supra*, note 1.

¹⁴ Opposition of Northcoast Communications, L.L.C.; Consolidated Opposition and Comments of DCC PCS, Inc.; Opposition and Comments of MCG PCS II, Inc.; Opposition of PCS Partners, L.P.; Opposition of Salmon PCS LLC; Opposition of Summit Wireless, LLC.

¹⁵ We note that 21st Century's Replies filed on March 26, 2001 were untimely under the Commission's rules. See 47 C.F.R. § 1.2108(c). In view of our dismissal of 21st Century's Petition for lack of standing, we need not address whether to consider the untimely Replies.

¹⁶ See Petitions to Deny at 10-11.

¹⁷ 47 U.S.C. § 309(d)(1). See also 47 C.F.R. § 24.830(a)(3) (a petition must "[c]ontain specific allegations of fact . . . sufficient to demonstrate that the petitioner . . . is a party in interest and that a grant of, or other Commission action regarding, the application would be *prima facie* inconsistent with the public interest."). We note that all parties submitting oppositions and responses to 21st Century's Petitions argue that the Petitions should be dismissed

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sufficient to show that grant of the subject applications would cause it to suffer a “direct injury”¹⁸ and to demonstrate “a causal link between the claimed injury and the challenged action.”¹⁹ Any interest that 21st Century may have in the subject licenses will be protected because, as discussed below, any grant of these licenses will be conditioned upon the outcome of 21st Century’s Further Reconsideration Petition. We therefore dismiss the instant Petitions as procedurally defective.

5. We will discuss the issues raised by these Petitions, however, in light of their importance. 21st Century argues that, if the Commission proceeds to grant the license applications before its appeal is decided, 21st Century “will be deprived of its due process right to a fair and unbiased post-deprivation hearing.”²⁰ 21st Century contends that the Commission’s pecuniary interest in collecting auction revenues precludes it from acting as an impartial adjudicator in deciding 21st Century’s appeal.²¹ We do not believe that granting the subject license applications conditioned upon the outcome of 21st Century’s Further Reconsideration Petition renders the Commission unable to fairly decide the rights of 21st Century in that pending appeal. By statute, the Commission may not base a finding of public interest, convenience, and necessity with respect to licensing matters on the expectation of federal revenues raised from spectrum auctions.²² We are not persuaded that the Commission will fail to resolve 21st Century’s administrative appeal on its own merits rather than on a statutorily-prohibited basis.

6. Any interest that 21st Century has in the licenses will be protected by the conditional grant of the licenses. The Commission afforded bidders with ample notice that the Auction No. 35 licenses were subject to pending proceedings and that the award of those licenses would be conditioned on the outcome of those proceedings. Specifically, the Commission stated in a Public Notice that “potential bidders should be aware that certain of the licenses included in Auction No. 35 are or may become the subject of Commission or judicial proceedings initiated by parties claiming to have continuing interests in the licenses.”²³ This Public Notice also specifically provided that in the event that final determinations reached in pending proceedings required winning bidders to surrender licenses won

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due to lack of standing. See Opposition of Northcoast Communications, L.L.C. at 2; Consolidated Opposition and Comments of DCC PCS, Inc. at 11-12; Opposition and Comments of MCG PCS II, Inc. at 2-3; Opposition of PCS Partners, L.P. at 1-2; Opposition of Salmon PCS LLC at 7; Opposition of Summit Wireless, LLC at 7-8.

¹⁸ See *In re Applications of ABC Wireless, L.L.C. and American Wireless, L.L.C.*, Order, 15 FCC Rcd 6787 ¶ 4 (1999); *In re Application of Los Angeles Cellular Telephone Company*, Order, 13 FCC Rcd 4601, 4603-4604 ¶ 5 (1998); *In the Matter of AmericaTel Corporation, Memorandum Opinion, Order, Authorization and Certificate*, 9 FCC Rcd 3993, 3995 (1994); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

¹⁹ See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74, 81 (1978).

²⁰ *Id.* at 5.

²¹ *Id.* at 6-10.

²² 47 U.S.C. § 309(j)(7)(A). See also *In re FCC Report to Congress on Spectrum Auctions, Report*, FCC 97-353 (rel. Oct. 9, 1997) (“[T]he Commission’s statutory authority continues to instruct that the agency not base spectrum allocation decisions ‘solely or predominantly’ on the expectation of revenues that auctions may generate. The Commission’s primary mission in conducting auctions is promoting competition by awarding licenses rapidly to those who value them most highly.”) (citation omitted); *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2361 ¶ 73 (1994) (“While Congress has charged [the FCC] to recover a portion of the value of the public spectrum made available via competitive bidding, this does not amount to maximizing revenue, nor is it [the FCC’s] sole objective.”).

²³ “C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000,” *Public Notice*, 15 FCC Rcd 17,251, 17,256 (2000).

in Auction No. 35 to prior license holders, the Commission would return payments made by the winning bidders.²⁴ Moreover, we note that the existence of various proceedings during and after an auction is not new. Rather, pending administrative and judicial appeals are often associated with licenses that are being offered at auction.²⁵ As a general matter, the Commission does not defer grant of license applications until pending proceedings are complete. Instead, in order to serve the public interest in prompt implementation of telecommunications services, the Commission conditions the grant of such licenses on the outcome of pending proceedings. This is the approach that was followed in other auctions.²⁶ Consistent with this approach, the grant of any of the above-captioned licenses will be conditioned on the outcome of 21st Century's Further Reconsideration Petition.

7. Finally, we do not believe that the public interest would be served by deferring grant of the licenses. In accordance with Section 309(j) of the Telecommunications Act, the Commission must ensure "the development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or judicial delays,"²⁷ and promote the "efficient and intensive use of the electromagnetic spectrum."²⁸ These goals can best be met by moving forward with the Auction No. 35 licensing process. As the Bureau stated in its order denying 21st Century's request to stay Auction No. 35, "[i]f we were to accept 21st Century's arguments for granting a stay, subsequent spectrum auctions would be at risk of substantial postponement while the Commission and courts review the myriad issues parties raise in attempts to circumvent auctions for their individual purposes."²⁹ Contrary to 21st Century's contentions, proceeding with licensing should ensure that the spectrum is utilized and service is provided to the public in the most expeditious and effective manner possible.³⁰ Deferring grant

²⁴ *Id.*

²⁵ *See, e.g., Bachow Communications, Inc. v. Federal Communications Commission*, 237 F.3d 683 (D.C. Cir. 2001) (applicants for licenses in the 39 GHz band sought review of FCC interim procedures adopted during transition from comparative to competitive application process); *PLMRS Narrowband Corp. v. Federal Communications Commission*, 182 F.3d 995 (D.C. Cir. 1999) (applicants for licenses in the 220 MHz band sought review of FCC decision to assign licenses by auction rather than lottery); *Fresno Mobile Radio, Inc. v. Federal Communications Commission*, 165 F.3d 965 (D.C. Cir. 1999) (incumbent licensees sought review of FCC decision to allocate licenses in the 800 MHz band by auction).

²⁶ *See, e.g., "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 Scheduled for March 23, 1999, Minimum Opening Bids and Other Procedural Issues," Public Notice*, 13 FCC Rcd 24,540 (1998), *citing* Application of Wireless Co., L.P. for a License to Provide Broadband PCS Service on Block A in the San Francisco Major Trading Area, *Order*, 10 FCC Rcd 13,233, 13,236 (1995) (denying petitions to deny applications for A and B block PCS licenses in the San Francisco and Boston major trading areas pending resolution of litigation addressing petitioners' pioneer preference requests for these markets).

²⁷ 47 U.S.C. § 309(j)(3)(A).

²⁸ 47 U.S.C. § 309(j)(3)(D).

²⁹ 21st Century Telesis, Inc., Request for Partial Reconsideration of Public Notice DA 00-2038, Request for Stay of Public Notice DA 00-2038, *Order*, DA 00-2889, ¶ 6 (rel. Dec. 21, 2000).

³⁰ A winning bidder's failure to pay on time and in full may demonstrate that the entity does not have the financial ability to pay for its licenses and deploy services to the public. *See, e.g., Mountain Solutions Ltd., Inc., Emergency Petition for Waiver of Section 24.711(A)(2) of the Commission's Rules Regarding Various BTA Markets in the Broadband Personal Services (PCS) C Block Auction, Memorandum Opinion and Order*, 13 FCC Rcd 21,983, 21,992-93, ¶¶ 17-18 (1998) (payment rules ensure financial viability of winning bidder and provide an indication of its capability to actually build out its system); *21st Century MO&O, supra* note 11, at ¶ 10 (requiring winning bidders to pay on time and in full preserves the reliability and integrity of the Commission's auction and licensing program and furthers statutory goal of bringing competitive wireless services to the public without undue
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of the licenses pending the final outcome of 21st Century's Further Reconsideration Petition would only frustrate the public's interest in the efficient deployment of telecommunications services in this spectrum, contrary to the statutory objectives.

IV. Ordering Clause

8. Accordingly, IT IS ORDERED that, pursuant to Sections (4)(i), 309(d)(1) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d)(1), 309(j), and sections 0.331, 1.2108 and 24.830 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.2108, 24.830, the Petitions to Deny filed jointly by 21st Century Telesis Joint Venture and 21st Century Bidding Corp. on March 9, 2001 ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Linda C. Ray
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delay). *But see* Further Reconsideration Petition, *supra* note 1 (pending request for reconsideration of *21st Century MO&O*).