

Federal Communications Commission
Washington, D.C. 20554

February 14, 2001

DA 01-385

Fred D. Middleton, Jr.
President
P.A.W., Inc.
526 Superior Avenue, East
#620 The Leader Building
Cleveland, Ohio 44144-1900

Re: Eligibility Status of P.A.W., Inc. for the 218-219 MHz Service Restructuring Plan

Dear Mr. Middleton:

This letter responds to your correspondence on behalf of P.A.W., Inc. (“P.A.W.”)¹ requesting reconsideration of the Auctions Finance and Market Analysis Branch (“Branch”) determination² that P.A.W. is ineligible to participate in the restructuring plan adopted in the Commission’s *218-219 MHz Order*.³ P.A.W. contends that it complied with Commission regulations for payments and grace period requests, and therefore is entitled to participate in the Commission restructuring plan.⁴ As such, P.A.W. asserts that its failure to make any installment payments should not have resulted in its default and the automatic cancellation of its licenses⁵

¹ Petition to Appeal the Denial of P.A.W., Inc. Eligible in the 218-219 MHz Restructure Plan, dated May 22, 2000 (“P.A.W. Petition”).

² Letter to Fred D. Middleton, Jr., P.A.W., Inc., from Rachel Kazan, Chief, Auctions Finance and Market Analysis Branch, Wireless Telecommunications Bureau, Federal Communications Commission, dated January 6, 2000 (“P.A.W. Ineligibility Letter”).

³ Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, FCC 99-239, WT Docket No. 98-169, RM-8951, 15 FCC Rcd 1497 (1999) (“*218-219 MHz Order*”); see In the Matter of Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, WT Docket No. 98-169, FCC No. 00-411 (rel. December 13, 2000) (“*Second Order on Reconsideration*”).

⁴ P.A.W. Petition.

⁵ In Auction No. 2 held July 28-29, 1994, P.A.W. was the winning bidder for five licenses in the 218-219 MHz Service for the following Metropolitan Statistical Areas (“MSAs”) and frequency blocks: 143 (Johnstown, PA) Block B; 145 (Hamilton-Middletown, OH) Block B; 225 (Altoona, PA) Block B; 231

pursuant to Section 1.2110 of the Federal Communication Commission's ("Commission") rules.⁶ Thus, P.A.W. contends that it should be eligible to participate in the 218-219 MHz Service restructuring plan. For the reasons set forth below, we deny P.A.W.'s request.⁷

1. Background

On September 10, 1999, the Commission issued the *218-219 MHz Order*, which modified the regulations governing the licensing of the 218-219 MHz Service (formerly known as IVDS) to maximize the efficient and effective use of the band.⁸ The *218-219 MHz Order*, among other measures, modified service and technical rules for the band and extended the license term from five to ten years.⁹ The *218-219 MHz Order* also announced the Commission's decision to adopt a financial restructuring plan for "Eligible Licensees." Eligible Licensees are licensees that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules.¹⁰ "Ineligible Entities" are former licensees that made second down payments and: (i) made some installment payments, but were not current in their installment payments as of March 16, 1998, and did not have a grace period request on file in conformance with the former rules; or (ii) entities that never made any installment payments and did not have a timely filed grace period request on file.¹¹ Ineligible Entities are not entitled to participate in the 218-219 MHz Service restructuring plan as their licenses cancelled automatically.¹² However, Ineligible Entities will be granted debt forgiveness for any outstanding balances owed and will be refunded their previously paid installment payments.¹³

(Mansfield, OH) Block B; and 282 (Bloomington, IN) Block A. Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, Mimeo No. 44160, rel. Aug. 2, 1994.

⁶ 47 C.F.R. § 1.2110 (1994).

⁷ See also Letter to J. Jeffrey Craven, Esq. Patton Boggs, L.L.P., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, DA 01-170, dated January 23, 2001 ("*IVIDCO*").

⁸ *218-219 MHz Order*, 15 FCC Rcd at 1506 ¶ 15.

⁹ *Id.* at 1517 ¶ 31.

¹⁰ *Id.* at 1520 ¶ 37.

¹¹ *Id.* at 1520 ¶ 38.

¹² *Id.* at 1518 ¶ 33 (citing 47 C.F.R. § 1.2110 (1994)); see also, *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999), *mandamus granted*, *In re Federal Communications Comm'n*, 217 F.3d 125 (2d Cir. 2000); *Mountain Solutions v. FCC*, 197 F.3d 512 (D.C. Cir. 1999) (upholding the Commission's decision, in a PCS licensing matter, to deny a waiver of its rule requiring a winning bidder to timely submit both its first and second down payment before the Commission will grant a license); 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*, FCC 00-335, 15 FCC Rcd 17,500 (2000) ("*NextWave Order on Reconsideration*").

¹³ *218-219 MHz Order*, 15 FCC Rcd at 1520 ¶ 38; Implementation Procedures For The Report And Order And Memorandum Opinion And Order Addressing the 218-219 MHz Services (formerly known as

In January 2000, in accordance with the rules set forth in the *218-219 MHz Order*, current and former 218-219 MHz licensees were notified of their eligibility status with regard to the restructuring plan. P.A.W. was informed that it was an Ineligible Entity.¹⁴ P.A.W. did not meet the eligibility criteria for participation in the 218-219 MHz Service restructuring plan because it never made an installment payment on any of its licenses, and it did not file a timely grace period request.

Upon notification of its ineligibility, P.A.W. sought reconsideration of the Branch's decision. In its petition, P.A.W. contends that it had until January 1997, approximately 2 years after grant of its licenses, to file a grace period request.¹⁵ In support of its contention, P.A.W. relies on a document regarding the 218-219 MHz service that appears to be a newsletter produced by a third party, Don Lounibos, who was not a government employee. In addition, P.A.W. relies upon alleged conversations with Commission staff.¹⁶

2. Discussion

P.A.W.'s petition fails to demonstrate that it is eligible to participate in the 218-219 MHz Service restructuring plan. P.A.W. failed to make a single installment payment on its licenses.¹⁷ P.A.W.'s first installment payment was due on January 5, 1996.¹⁸ The Commission's rules in effect at that time 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

Interactive Video And Data Services (IVDS)), *Public Notice*, DA 00-900, 15 FCC Rcd 7329 (2000) (WTB) (noting that the Department of Justice authorized the reduction of debt owed to the United States in accordance with the debt relief provisions of the *218-219 MHz Order*); *see also* *IVIDCO*.

¹⁴ *P.A.W. Ineligibility Letter*.

¹⁵ Affidavit of Fred D. Middleton, Jr., May 22, 2000 at ¶ 6 ("P.A.W. Petition Attachment"). P.A.W. does not indicate a specific date in the month of January 1997.

¹⁶ *Id.* at ¶ 6; P.A.W. Petition at Exhibit B. P.A.W. does not provide a date when the purported conversations with Commission staff were held.

¹⁷ *P.A.W. Ineligibility Letter*.

¹⁸ *218-219 MHz Order* 15 FCC Rcd at 1504 ¶ 11; *Second Order on Reconsideration* at ¶ 8.

¹⁹ 47 C.F.R. § 1.2110(e)(4)(ii) and (iii) (1994). The Commission amended the installment payment rules in 1998 to provide for two automatic grace periods of ninety days, subject to late fees. 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, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 at 436 (1997) ("*Part 1 Third Report and Order*"); *see also* 47 C.F.R. § 1.2110(f)(4)(ii)(iii) (1998). The 1998 amendment of the installment payment rules did not affect pending grace period requests filed by 218-219 MHz Service licensees. *Part 1 Third Report and Order*, 13 FCC Rcd at 441-442 ¶ 113; Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service WT Docket No. 98-169, RM-8951, *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC No. 98-228, 13 FCC Rcd 19064 at 19072 ¶ 30 (1998) ("*218-219 MHz Flex NPRM*"). More recently, the Commission further modified these rules. Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, WT No. 97-82, FCC No. 00-274 (rel. August 14, 2000) ("*Order on Reconsideration of the Part 1 Third Report and Order*").

Accordingly, in order to avoid automatic cancellation of its licenses, P.A.W. should have filed a grace period request no later than April 4, 1996.²⁰ P.A.W. does not even assert that it met this deadline. Consequently, P.A.W. went into default and its licenses cancelled automatically. In its petition, P.A.W. fails to present any facts that establish it met the criteria to be an Eligible Licensee. Further, its argument that it had until January 1997 to file a grace period request is legally and factually flawed.

P.A.W.'s contention that it had until January 1997 to file a grace period request is unsupported. The Commission, in the *1995 IVDS Omnibus Order*, and the Bureau in the *IVDS Grace Period PN*, cautioned licensees that, in accordance with Section 1.2110(e)(4)(ii)²¹ of our Rules, if winning bidders individually required financial assistance, they should request a three- or six-month grace period during the first ninety days following any missed installment payments.²² The Bureau further cautioned licensees that if a licensee failed to make timely payments the license would be in default if a grace period request had not been filed.²³ The Commission's rules in effect at that time provided for a 90-day non-delinquency period.²⁴ Any licensee whose installment payment was more than ninety days past due was in default, unless the licensee properly filed a grace period request.²⁵ Licensees with properly filed grace period requests would not be held in default during the pendency of their requests and the interest accruing would be amortized by adding it to the other interest payments over the remaining term of the license.²⁶ Upon expiration of any grace period without successful resumption of payment, or upon default with no such request submitted, the license would cancel automatically.²⁷

In light of the ample notice given to licensees regarding the grace period rules, P.A.W. has failed to support its contention that it had until January of 1997 to file a grace period request. Neither the newsletter attached to the petition, nor the purported conversations P.A.W. personnel had with Commission staff change the obligations of a licensee or the effect of the Commission's rules. The statements of a third party in the newsletter attached to P.A.W.'s petition do not bind

²⁰ 47 C.F.R. § 1.2110(e)(4)(ii) and (iii) (1994).

²¹ 47 C.F.R. § 1.2110(e)(4)(ii) (1994).

²² Interactive Video and Data Service (IVDS) Licensees, Various Requests by Auction Winners, *Order*, FCC No. 95-479, 11 FCC Rcd 1282 at 1285 ¶ 19 (1995) ("*1995 IVDS Omnibus Order*"); Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying By Installment Payments, *Public Notice*, DA 95-1617, 10 FCC Rcd 10724 (1995) (WTB) ("*IVDS Grace Period PN*"); *see also* Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block Auction, *Public Notice*, Mimeo 54270 (1995) (clarified grace period rule in the context of Personal Communications Services auction) ("*PCS Grace Period PN*").

²³ *IVDS Grace Period PN*, 10 FCC Rcd 10724 ("IVDS licensees that elect to pay for their license in installments will have their license conditioned upon full and timely performance of all installment payment obligations. The Commission's rules provide that a licensee will be deemed in default on its installment payments if it is more than 90 days delinquent in making a payment to the government.").

²⁴ 47 C.F.R. § 1.2110(e)(4)(ii) and (iii) (1994).

²⁵ *Id.*

²⁶ *218-219 MHz Order*, 15 FCC Rcd at 1505 ¶ 12 (*citing* 47 C.F.R. § 1.2110(e)(4)(ii)(iii) (1994)).

²⁷ *Id.*; *see also IVDS Grace Period PN*, 10 FCC Rcd 10724; *PCS Grace Period PN*; *IVIDCO*.

the Commission. Accordingly, the newsletter does not support P.A.W.'s contention that it had until January 1997 to file a grace period request. Further, it appears that this newsletter was providing advice to entities relating to a March 1997 installment payment and not the January 5, 1996 installment payment missed by P.A.W. Finally, because the newsletter is dated "February/March 1997," P.A.W. cannot contend that, prior to January 1997, it relied upon the newsletter to determine the date by which it must file a grace period request.

P.A.W. also alleges in its affidavit that it held telephone conversations with Commission staff that purportedly led P.A.W. to conclude that the grace period filing deadline was in January 1997.²⁸ P.A.W. does not offer any details regarding the purported conversation. Even assuming such phone conversations occurred, it would not change the result here because the Commission would not be bound by erroneous advice given by a staff member.²⁹ This is especially true here as the Commission repeatedly indicated to licensees the consequence of failing to make timely payments.³⁰

Finally, in its Petition, P.A.W. notes that it filed for Chapter 11 bankruptcy in U.S. Bankruptcy Court, Northern District of Ohio, on February 28, 1996.³¹ The bankruptcy court dismissed P.A.W.'s petition on December 3, 1996.³² Although P.A.W. did not argue that the bankruptcy should be taken into consideration here, we note that filing for bankruptcy did not relieve P.A.W. from its obligation to make installment payments, or to file a request for a grace period, if it was experiencing financial difficulty.³³

3. Conclusion

For the reasons detailed above, we find that P.A.W. has not timely filed a grace period request with the Commission. Nor does P.A.W. otherwise meet the requirements for "Eligible Licensee" status for participation in the 218-219 MHz Service restructuring plan. Accordingly, P.A.W.'s petition for reconsideration of the Branch's decision regarding P.A.W.'s eligibility to participate in the 218-219 MHz Service restructuring plan is DENIED.

²⁸ P.A.W. Petition Attachment at ¶ 6.

²⁹ *Office of Personnel Management v. Richmond*, 497 U.S. 1046 (1990) (there can be no estoppel against the Federal Government where an employee has given erroneous oral or written advice contrary to statute); *In the Matter of Request for Review of the Decision of the Universal Service Administrator by Merced Union High School District, Merced, California*, Order, DA 00-1887, ¶ 7 (rel. Aug. 18, 2000) (CCB) (applying *Office of Personnel Management v. Richmond* to the Commission's rules and procedures); *In re Mary Ann Salvatoriello, Memorandum Opinion and Order*, 6 FCC Rcd 4705, 4707-08, ¶ 22 (1991) (applying *Office of Personnel Management v. Richmond* to the Commission's rules and procedures).

³⁰ *1995 IVDS Omnibus Order*, 11 FCC Rcd 1282 at 1285 ¶ 19; *IVDS Grace Period PN*, 10 FCC Rcd 10724; *Second Order on Reconsideration* at ¶ 28.

³¹ P.A.W. Petition Attachment at ¶ 2; *In re P.A.W., Inc.*, No. 96-10711 (Bankr. N.D. Ohio filed Dec. 3, 1996).

³² *In re P.A.W., Inc.*, No. 96-10711 (Bankr. N.D. Ohio filed Dec. 3, 1996).

³³ See *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999), *mandamus granted*, *In re Federal Communications Comm'n*, 217 F.3d 125 (2d Cir. 2000); see also *NextWave Order on Reconsideration*.

This action is taken pursuant to sections 1, 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 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