

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

In the Matter of
Personal Communications Service
Beckley, West Virginia Basic Trading
Area No. 35, C Block License
Auction No. 22
File No. 0000012900

ORDER ON RECONSIDERATION

Adopted: March 27, 2001

Released: March 28, 2001

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

I. INTRODUCTION

1. On October 4, 1999, OPM Auction Co. (OPM) filed a Petition for Reconsideration of our September 2, 1999 Order denying its Petition for Emergency Relief. OPM argues that we committed error in our interpretation of the Commercial Mobile Radio Services (CMRS) spectrum cap in section 20.6 of our rules. For the reasons discussed below, we deny OPM's Petition.

II. BACKGROUND

2. OPM and Highland Cellular, Inc. (Highland Cellular) participated in the C, D, E and F block broadband PCS license auction (Auction 22) that opened on March 23, 1999 and closed on April 15, 1999. OPM was the high bidder in round 33 for the 30 MHz C block license

1 OPM Petition for Reconsideration, filed October 4, 1999 (Petition).

2 Personal Communications Service Beckley, West Virginia Basic Trading Area No. 35, C Block License Auction No. 22, Order, 15 FCC Rcd 6750 (1999) (OPM Order).

3 47 C.F.R. § 20.6 (1999).

4 Pursuant to section 1.106(a)(1) of the Commission's rules, 47 C.F.R. § 1.106(a)(1), the Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, has chosen to rule on the Petition because it does not raise any new or novel questions of law or policy requiring the Commission's direct resolution.

in the Beckley, West Virginia Basic Trading Area (BTA35) with its gross bid of \$487,000.<sup>5</sup> OPM also had the high bid of \$113,000 for the BTA35 license in round 25, then alternated high bids with Highland Cellular in rounds 26 through 33.<sup>6</sup> At the time Highland Cellular bid in Auction 22, it held an attributable interest in 25 MHz of cellular spectrum that had significant overlap of the geographic area covering BTA35.<sup>7</sup> In its Petition, OPM requests that its high bid of \$113,000 in round 25 be declared the winning bid and that it be refunded \$317,900.<sup>8</sup>

3. In the *OPM Order*, we rejected OPM's claim that Highland Cellular was ineligible under the spectrum cap rule to bid on BTA35. We stated that if Highland Cellular had won the BTA35 license it would not have been attributed with the additional 30 MHz of spectrum from the auction and thus would not have been in potential violation of the spectrum cap until grant of the license.<sup>9</sup> We further found that if Highland Cellular had won the BTA35 license, it could have complied with the spectrum cap by divesting its cellular license prior to the grant of the PCS license.<sup>10</sup> As a result, we denied OPM's request to eliminate the bids made by Highland Cellular after round 25 and to reinstate OPM's bid of \$113,000 in round 25 as the winning bid.

4. OPM argues that Highland Cellular was ineligible to bid for the BTA35 license in Auction 22 because it would have exceeded the 45 MHz spectrum cap in that geographic area had it been granted the license, and it did not qualify for the divestiture provision for high bidders set forth in section 20.6(e)<sup>11</sup> of the rules, which permitted only qualifying high bidders to divest spectrum in order to comply with the cap.<sup>12</sup> The spectrum cap rule states that "[n]o licensee in the broadband PCS, cellular, or SMR services regulated as CMRS shall have an attributable interest in a total of more than 45 MHz of licensed broadband PCS, cellular, and SMR spectrum

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<sup>5</sup> Petition at 1-2. See C, D, E, and F Block Broadband PCS License Auction Closes, Winning Bidders of 302 Licenses Announced, *Public Notice*, DA 99-757, 14 FCC Rcd 6688 (1999), Attachment A at 2; Reissuance of Attachment A, Correction to Attachment D, Change in Down Payment and Filing Deadline, *Public Notice* (rel. April 21, 1999).

<sup>6</sup> Petition at 2.

<sup>7</sup> *OPM Order* at 2.

<sup>8</sup> Petition at 7-8. The refund of \$317,900 claimed by OPM is based on its net high winning bid of \$413,950 (OPM's round 33 gross high bid of \$487,000 with a 15 percent bidding credit) less \$96,050 (OPM's round 25 gross high bid of \$113,000 with a 15 percent bidding credit).

<sup>9</sup> *OPM Order* at 2.

<sup>10</sup> *Id.*

<sup>11</sup> 47 C.F.R. § 20.6(e) (1999). The Commission amended Section 20.6(e) in its biennial review of the spectrum cap in 1999. See 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, *Report and Order*, 15 FCC Rcd 9219, 9269, ¶ 117 (1999). The amendment, which took effect after the completion of Auction 22, is not relied on in our ruling here.

<sup>12</sup> Petition at 2-3.

regulated as CMRS with significant overlap in any geographic area.”<sup>13</sup> Section 20.6(e)(1) provides that any party holding controlling or attributable ownership interests in broadband PCS, cellular, and/or SMR licensees that would exceed the 45 MHz spectrum cap, if granted additional licenses, may be a party to a broadband PCS, cellular, or SMR application, and will be eligible for licenses amounting to more than the 45 MHz limit, pursuant to the divestiture procedures set forth in Section 20.6(e)(2) through (e)(4). Section 20.6(e)(1) further provides that in the case of parties holding controlling or attributable ownership interests in broadband PCS, cellular, and/or SMR licensees, these divestiture procedures shall be available only to “[p]arties with controlling or attributable ownership interests in broadband PCS, cellular, and/or SMR licenses where the geographic license areas cover 20 percent or less of the applicant’s service area population . . . .”<sup>14</sup>

5. OPM argues that section 20.6(e)(i) prevented Highland from being a party to an application for the BTA35 license because the amount of the overlap in the BTA exceeded 80 percent.<sup>15</sup> OPM contends that because the divestiture procedures in section 20.6(e) were unavailable to Highland Cellular, Highland Cellular was not eligible to obtain, or even apply for, the Beckley BTA license.<sup>16</sup> OPM argues that the use of the grant of the license as the precise moment in time at which the PCS spectrum becomes attributable ignores a concern for limiting divestiture opportunities because bidders could manipulate the bidding process.<sup>17</sup> As a result, OPM argues that we were wrong to conclude that Highland Cellular could have complied with the spectrum cap by divesting its cellular license prior to grant of the PCS license.

### III. DISCUSSION

6. We do not agree with OPM’s interpretation of the spectrum cap rule. Section 20.6(a) clearly applies to “licensees” with attributable interests in “licensed” spectrum.<sup>18</sup> Accordingly, PCS spectrum acquired at auction does not become attributable to the winning bidder until the license is granted. This determination is consistent with Section 20.6(d) of the Commission’s rules, which provides that convertible debentures and other instruments are not attributed unless and until conversion is effected.<sup>19</sup> In addition, there were no spectrum cap eligibility restrictions placed on bidders in Auction 22, provided they came into compliance with

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<sup>13</sup> 47 C.F.R. § 20.6(a).

<sup>14</sup> 47 U.S.C. § 20.6(e)(1)(i). OPM argues that sections 20.6(e)(ii) and (iii) are also inapplicable to Highland Cellular because Highland Cellular is the actual licensee of the cellular system and would be the licensee of the PCS system as well. Petition at 4-5.

<sup>15</sup> Petition at 4.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 6 (quoting Amendment of the Commission’s Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5014, ¶ 143 (1994) (*PCS MO&O*)).

<sup>18</sup> *See* 47 C.F.R. § 20.6(a).

<sup>19</sup> *See* 47 C.F.R. § 20.6(d)(5).

the spectrum cap upon grant of the Auction 22 license.<sup>20</sup> In order to comply with the spectrum cap, Highland Cellular could have divested its cellular spectrum prior to the issuance of the license. Therefore, we affirm our decision that had Highland Cellular been the winning bidder for the BTA35 license, the 30 MHz of spectrum would not have been attributable to Highland Cellular until the license was granted.

7. OPM also argues that section 20.6(e)(1)(i) provides that an entity with controlling or attributable ownership interests in broadband PCS, cellular and/or SMR licenses that would exceed the spectrum cap if awarded additional licenses may only participate in auctions for these services, subject to divestiture procedures, if the entity's geographic license area covers 20 percent or less of the applicant's service area. The purpose of this provision is to determine whether a winning bidder will be able to use the divestiture provisions in section 20.6(e)(2)-(4), including the allowance for an additional 90 days to come into compliance with the spectrum cap once the spectrum is attributable.<sup>21</sup> Thus, the winning bidder is eligible to divest spectrum in order to comply with the spectrum cap, but only a winning bidder that meets the qualifications set forth in section 20.6(e)(1) is given an additional 90 days after the license is granted to come into compliance. Although Highland Cellular would not have been eligible for an additional 90 days to comply with the spectrum cap, it would have been eligible to divest cellular spectrum before the license was granted and thus was eligible to bid in Auction 22. Moreover, Highland Cellular would have had significant incentives to divest prior to grant of the PSC license if it had been the winning bidder on BTA35. As the winning bidder, Highland Cellular would have been required to submit its long form application and sufficient funds in addition to its upfront payment to bring its total deposits up to 20 percent of its net high bids.<sup>22</sup> Further, under our rules a bidder that defaults or is disqualified after the auction closes would be deemed in default and subject to default payments.<sup>23</sup>

8. Finally, OPM argues that a finding that Highland was eligible to bid on BTA35 would violate the Commission policy adopted in the *PCS MO&O*. The *PCS MO&O* addressed the PCS/cellular cross-interest rule that set forth eligibility restrictions for cellular licensees seeking to acquire PCS spectrum.<sup>24</sup> OPM notes that these restrictions were adopted due to a

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<sup>20</sup> See Auction of 356 Broadband PCS Licenses, 66 Qualified Bidders, *Public Notice*, DA 99-482, 14 FCC Rcd 3855 (1999); Auction of C, D, E, and F Block Broadband PCS Licenses, Status of Applications to Participate in the Auction, Clarification of Payment Issue Relating to Licenses Subject to Pending Proceedings, *Public Notice*, DA 99-375, 14 FCC Rcd 5467 (1999); 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 Licenses Scheduled for March 23, 1999, Minimum Opening Bids and Other Procedural Issues, *Public Notice*, DA 98-2604, 13 FCC Rcd 24540 (1998).

<sup>21</sup> See 47 C.F.R. § 20.6(e)(4) (1999).

<sup>22</sup> See 47 C.F.R. § 1.2107(b)-(c).

<sup>23</sup> See 47 C.F.R. § 1.2104(g)(2).

<sup>24</sup> Petition at 5. See *PCS MO&O*, 9 FCC Rcd at 4984, ¶ 67 (1994); 47 C.F.R. § 24.204 (1994).

concern that otherwise ineligible bidders could manipulate the bidding process.<sup>25</sup> We find that this restriction adopted in the *PCS MO&O* is not relevant to our analysis here because it concerns the PCS/cellular cross-interest restriction, not the spectrum cap. Moreover, the Commission later removed the PCS/cellular cross ownership rule.<sup>26</sup>

**IV. ORDERING CLAUSE**

9. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and sections 0.331 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.106, the Petition for Reconsideration filed by OPM Auction Co. on October 4, 1999, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Paul D'Ari  
Chief, Policy and Rules Branch  
Commercial Wireless Division  
Wireless Telecommunications Bureau

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<sup>25</sup> Petition at 5.

<sup>26</sup> See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7869, ¶ 94 (1996).