



FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

DA 03-2273  
July 11, 2003

Mr. John Jung  
Jung on Jung  
350 5<sup>th</sup> Avenue  
Suite 6107  
New York, NY 100118

Dear Mr. Jung:

This letter responds to correspondence filed on behalf of Jung on Jung requesting that the Auctions and Industry Analysis Division ("Division") waive the Commission's installment payment rules.<sup>1</sup> Specifically, Jung on Jung requests that the Division waive Jung on Jung's late fees and allow an extension of its installment payment obligations on two Multipoint Distribution Service ("MDS") licenses, MDB010 (Allentown-Bethlehem) and MDB488 (San Juan, PR). For the reasons set forth below, we deny Jung on Jung's request for waiver and extension of its installment payment obligations.

### **1. Background**

On March 28, 1996, the Commission announced that Jung on Jung was the high bidder for two MDS licenses,<sup>2</sup> including MDB010 (Allentown-Bethlehem) and MDB488 (San Juan, PR), in Auction No. 6. As a small business, Jung on Jung was eligible to participate in the Commission's installment payment plan.<sup>3</sup> Grant of the licenses, MDB010 and MDB488, was conditioned upon Jung on Jung's full and timely

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<sup>1</sup> Letter from Jung on Jung, to Susan A. Donahue, Chief, Revenues & Receivables Operation Group, Office of the Managing Director, Federal Communications Commission, dated November 27, 2001 ("Waiver Request")(letter requesting extension of its installment payment deadline obligations); Letter from Jung on Jung, to Susan A. Donahue, Chief, Revenues & Receivables Operation Group, Office of the Managing Director, Federal Communications Commission, dated November 30, 2001 ("Supplemental Request")(additional letter requesting extension of its installment payment deadline obligations"); *see also* Letter from Jung on Jung, to Mr. Mark Reger, Chief Financial Officer, Federal Communications Commission, dated August 29, 2001. The August 29, 2001 letter questioned previous payment notices with respect to certain late fees, and to the extent necessary, sought waiver of late fees associated with past notices. Specifically, Jung on Jung questioned the absence of a late fee on its February 16, 2001 payment notice. The issue with regard to late fees is irrelevant because Jung on Jung wholly failed to make the May 31, 2001 quarterly installment payments within the two quarterly grace periods. Accordingly, we dismiss this request for clarification as moot.

<sup>2</sup> *See Public Notice*, "Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas," rel. March 29, 1996 ("*March 1996 Public Notice*"). Jung on Jung's net high bid for the B010 license was \$ 600,000 and the net high bid for the B488 license was \$716,000. *March 1996 Public Notice*, Attachment A.

<sup>3</sup> 47 C.F.R. §§ 1.2110(e) and 21.960(b)(2001).

performance of the payment obligations.<sup>4</sup> As an eligible licensee qualifying as a small business under 47 C.F.R. § 21.960(b), Jung on Jung was scheduled to make interest-only payments for the first two years of the license term.<sup>5</sup> Payments of interest and principal are amortized over the remaining eight years of the license term.<sup>6</sup> In accordance with Commission rules, Jung on Jung made its scheduled February 28, 2001 quarterly installment payments on August 30, 2001, *i.e.*, within the two quarterly grace periods. However, Jung on Jung failed to make further quarterly installment payments thereafter.<sup>7</sup>

The Commission's installment payments rule allows licensees to use up to two quarterly grace periods, subject to late payment fees, if the licensees require additional time to submit payment.<sup>8</sup> If a licensee fails to make an installment payment within that time period, it is considered to be in default of its installment payment obligations, and its license automatically cancels. Therefore, in accordance with the Commission's rules, when Jung on Jung failed to make the May 31, 2001 quarterly installment payments with the associated late fees within the two quarterly grace periods, *i.e.*, by December 1, 2001, it was in default, its license automatically canceled, and it is subject to debt collection procedures.<sup>9</sup>

## **2. Discussion**

Jung on Jung requests a waiver of the installment payment rules alleging that economic conditions, including an accelerated decline in Jung on Jung's business after the September 11, 2001 events, have undermined its financial ability to meet its installment payment obligations as well as its ability to operate as a small business.<sup>10</sup> Accordingly, Jung on Jung requests that the Commission waive Jung on Jung's late fees and allow an extension of its installment payment obligations on both the MDB010 (Allentown-Bethlehem) and MDB488 (San Juan, PR) licenses.

To obtain a waiver of the Commission's rules, Jung on Jung 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,

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<sup>4</sup> 47 C.F.R. §§ 1.2110(e) and 21.960(b)(2001) ("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' quarterly payments.").

<sup>5</sup> 47 C.F.R. § 21.960(b)(2001).

<sup>6</sup> *Id.*

<sup>7</sup> See Waiver Request at 1; Supplemental Request at 2 (noting that there was a slim likelihood that Jung on Jung would make its May 31, 2001 quarterly installment payments within the two quarterly grace periods).

<sup>8</sup> 47 C.F.R. § 1.2110(g)(4)(i)-(ii).

<sup>9</sup> 47 C.F.R. § 1.2110(g)(4)(iv); see also Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules, 13 FCC Rcd 18213, 18214 (1998) ("*WTB Guidance PN*") ("Any licensee that becomes more than one-hundred eighty (180) days delinquent on an installment payment shall be in default, and the license shall automatically cancel without further action by the Commission. In that event, the debt shall be transferred to the Department of Treasury for collection subject to the Debt Collection Improvement Act of 1996").

<sup>10</sup> Waiver Request at 1; Supplemental Request at 1. Jung on Jung does not assert that it lost facilities during the September 11, 2001 events, rather, Jung on Jung blames its financial problems on its business location being within 20 miles of the collapsed World Trade Center and the subsequent downturn in the economy.

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 Jung on Jung has no reasonable alternative.<sup>11</sup> For the reasons discussed below, we find that Jung on Jung's waiver request fails to meet the Commission's standard for granting a waiver.

Jung on Jung fails to show how the underlying purpose of our installment payment rules would not be served, or would be frustrated, by application of the rules in this instance, or that grant of the requested waiver would be in the public interest. In designing a licensing system that employs competitive bidding pursuant to Section 309(j)<sup>12</sup> of the Communications Act, the Commission determined that the Act's objectives would best be served by awarding licenses to those who value them most highly.<sup>13</sup> The Commission has repeatedly emphasized that strict enforcement of the installment payment rules enhances the integrity of the auction and licensing process by ensuring that winning bidders have the necessary financial capacity to build out its systems and provide service, and that spectrum is awarded to those qualified bidders who value the spectrum most.<sup>14</sup> Requiring licensees to comply with the full and timely payment rule is essential to a fair and efficient licensing process.<sup>15</sup> Moreover, it is fair to all participants in our auctions, including those who won licenses in the auction and those who did not, and it fosters the promotion of economic opportunity and competition in the marketplace and rapid deployment of new services for the benefit of the public.<sup>16</sup>

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<sup>11</sup> 47 C.F.R. § 1.925.

<sup>12</sup> 47 U.S.C. § 309(j).

<sup>13</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd. 2348 ¶ 70 (1994) ("*Competitive Bidding Second Report and Order*").

<sup>14</sup> 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*, 15 FCC Rcd 25103, 25110-11 at ¶ 15 (2000) ("*Southern Communications MO&O*"), *further recon. denied Second Memorandum Opinion and Order*, FCC 01-298 (rel. Oct. 12, 2001); Licenses of 21st Century Telesis, Inc., For Facilities in the Broadband Personal Communications Service, *Memorandum Opinion & Order*, 15 FCC Rcd 25113, 25117-18 at ¶ 10 (2000) ("*21st Century MO&O*"), *aff'd* 21st Century Telesis Joint Venture and 21st Century Bidding Corporation v. Federal Communications Commission, 318 F.3d 192 (D.C. Cir. 2003); Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly, *Public Notice*, 11 FCC Rcd 10853 (1996); *see WTB Guidance PN*, 13 FCC Rcd at 18214.

<sup>15</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing of Personal Communications (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8348 at ¶ 8 (1998); *see also* In the Matter of Amendment of Part 1 of the Commission's Rules, Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, 4660- 4685 MHz, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 429, 430 ¶¶ 95-96 (1998); *Southern Communications MO&O*, 15 FCC Rcd at 25106, ¶ 7; Letter to Messrs. Stephen Diaz Gavin and Paul C. Besozzi, Counsel for U.S. Telemetry Corporation, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 17 FCC Rcd 6442, 6446 (2002) ("*U.S. Telemetry Corporation Letter*").

<sup>16</sup> *See* Letter to Mr. Kurt Schueler, President of New England Mobile Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 19355, 19357-58 (2001) ("*New England Mobile Letter*").

The Commission's late payment rules for installment payments provide licensees experiencing financial difficulties a substantial amount of time within which to pursue private market solutions to their financial difficulties.<sup>17</sup> The Commission adopted these provisions for "extraordinary circumstances – instances of financial distress – for which temporary relief is appropriate."<sup>18</sup> The Commission has recognized that although there is considerable flexibility in its payment rules, "it is inevitable that some licensees will seek more time to pay," and, in this respect, the Commission's rules cannot accommodate every licensee's business plans.<sup>19</sup> In light of the flexibility already present in the installment payment rules, to allow Jung on Jung additional time would only serve to undermine the purpose behind enforcement of the Commission's payment deadlines, which the Commission decided is best served by strict enforcement after the expiration of the two quarterly grace periods.<sup>20</sup> The circumstances presented here, in fact, establish that strict enforcement serves the rule's underlying purpose because Jung on Jung neither offers a definitive time-frame nor any assurance for when it will be able to pay for its licenses.<sup>21</sup> Thus, grant of a waiver request based upon Jung on Jung's speculation that it may attract potential investors is not an adequate basis for grant of a waiver.<sup>22</sup> Accordingly, we find that Jung on Jung has failed to demonstrate that the rule's purpose would not be served, or that it would be frustrated, by applying it to Jung on Jung, and that petitioner has failed to show that grant of the requested waiver would be in the public interest.

Jung on Jung's arguments concerning the facts and circumstances of its particular case do not rise to the level of unique or unusual circumstances and therefore do not change our analysis. Jung on Jung's contention that a downturn in economic conditions coupled with a lack of financial participation

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<sup>17</sup> 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, ¶ 110 (1997) ("Part 1 Third Report and Order"); see also *Southern Communications MO&O*, 15 FCC Rcd at 25110, ¶ 15; *U.S. Telemetry Corporation Letter*, 17 FCC Rcd at 6446.

<sup>18</sup> 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*, 15 FCC Rcd 15293, 15304-05, ¶ 19 (2000) ("Part 1 Order on Recon of Third Report and Order"); *Part 1 Third Report and Order*, 13 FCC Rcd at 440, ¶ 110; see also *U.S. Telemetry Corporation Letter*, 17 FCC Rcd at 6446.

<sup>19</sup> Amendment of the Commission's Rules Regarding Installment Financing for Personal Communications Services ("PCS") Licensees, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8354 at ¶ 24 (1997) ("No matter what deadline we establish, it is inevitable that some licensees will seek more time to pay."); see also *Southern Communications MO&O*, 15 FCC Rcd at 25110, ¶ 15; *New England Mobile Letter*, 16 FCC Rcd at 19357-58 (noting that the Commission's payment rules cannot accommodate every business plan).

<sup>20</sup> *Southern Communications MO&O*, 15 FCC Rcd at 25111, ¶ 15; *21st Century MO&O*, 15 FCC Rcd at 25117-18, ¶ 10; *New England Mobile Letter*, 16 FCC Rcd at 19357-58; *U.S. Telemetry Corporation Letter*, 17 FCC Rcd at 6446-47.

<sup>21</sup> See *supra* notes 13 & 14.

<sup>22</sup> Waiver Request at 1.

by lenders has decreased its ability to fund the operation and development of its system and to make installment payments,<sup>23</sup> while unfortunate, is not a unique fact or circumstance that meets the waiver standard.<sup>24</sup> All licensees bear the risk of changes in the market. Licensees are obligated to maintain sufficient resources to both pay for and build out their licenses to serve the public.<sup>25</sup> Jung on Jung had full notice that the grant of its licenses was conditioned upon Jung on Jung's full and timely performance of the payment obligations and compliance with our general installment payment rules. Furthermore, Jung on Jung's speculation that market conditions will improve is not an adequate basis for grant of a waiver. Thus, Jung on Jung's alleged financial difficulties do not constitute unique circumstances sufficient to justify waiver of our late payment rules.<sup>26</sup> Accordingly, Jung on Jung's request is denied.

Accordingly, IT IS ORDERED that, the Waiver Request filed by Jung on Jung, dated November 27, 2001, and its Supplemental Request, dated November 30, 2001, are DENIED.

IT IS FURTHER ORDERED that the request dated August 29, 2001 is DISMISSED as moot.

IT IS FURTHER ORDERED that this letter shall be sent to the Jung on Jung and its representatives by certified mail, return receipt requested.

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<sup>23</sup> Waiver Request at 1; Supplemental Request at 2.

<sup>24</sup> *New England Mobile*, 16 FCC Rcd at 19358 (holding that a 218-219 MHz licensee's inability to raise sufficient capital to build out and pay for licenses does not justify waiver of the payment rules particularly when the licensee assumed such risks in electing the resumption option); *U.S. Telemetry Corporation Letter*, 17 FCC Rcd at 6447 (holding that a 218-219 MHz licensee's contention that a decline in the financial markets decreased its ability to fund the operation and development of its system and to make installment payments does not justify waiver of the payment rules since the licensee accepted the risk in acquiring the licenses); *see also Southern Communication MO&O*, 15 FCC Rcd at 25107, ¶ 10 (holding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule).

<sup>25</sup> *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).

<sup>26</sup> *See Southern Communications MO&O*, 15 FCC Rcd at 25107, ¶ 10 (holding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule); *U.S. Telemetry Corporation Letter*, 17 FCC Rcd at 6447.

*Jung on Jung*  
*July 11, 2003*

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.<sup>27</sup>

Sincerely,

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

cc: Jung on Jung, 240-72 67<sup>th</sup> Ave., 2<sup>nd</sup> Floor, Douglaston, NY 11362  
Mr. Jeffrey Craven, 2550 M Street, NW, Washington, DC 20037

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<sup>27</sup> 47 C.F.R. § 0.331.