



Federal Communications Commission
Washington, D.C. 20554

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DA 05 - 1131

Via Certified Mail, Return Receipt Requested

Ronald E. Quirk, Jr.
Venable, Baetjer, Howard & Civiletti, LLP
1201 New York Avenue, Suite 1000
Washington, DC 20005-3917

Dear Mr. Quirk,

This letter responds to the Petitions filed by Morris Communications, Inc. (Morris),¹ requesting a waiver of the rules that require the automatic cancellation of Morris's 900 MHz Specialized Mobile Radio ("SMR") Major Trading Area ("MTA") licenses.² Morris also seeks relief from Section 90.665(c) of the Commission's rules so that it may have additional time to construct a 900 MHz system.³ For the reasons set forth below, we deny Morris's Petitions.

Background

Morris requests relief with respect to nine SMR licenses. Morris placed winning bids for the SMR licenses in the 900 MHz auction (Auction No. 7), which concluded in April, 1996.⁴ Grant of these licenses was conditioned upon Morris's full and timely performance of its payment obligations.⁵ In the auction, Morris qualified as a designated entity eligible to pay its high bids in installment payments pursuant to the Commission's rules.⁶

¹ Morris Communications, Inc.'s Request for Waiver (filed May 2, 2002) ("Waiver I Request"); Morris Communications, Inc.'s Request for Stay (filed May 6, 2002) ("Stay Request"); Morris Communications, Inc.'s Petition for Rule Waiver (filed January 21, 2003) ("Waiver II Request") (collectively "Petitions").

² 47 C.F.R. § 1.2110(g)(4). The licenses at issue are KNNY352 - MTA006, Channel Block O; KNNY353 - MTA044, Channel Block R; KNNY355 - MTA029, Channel Block A; KNNY356 - MTA043, Channel Block Q; KNNY357 - MTA044, Channel Block H; KNNY358 - MTA043, Channel Block C; KNNY359 - MTA006, Channel Block A; KNNY361 - MTA044, Channel Block M; and KNNY363 - MTA044, Channel Block N.

³ See Morris Waiver II Request at 5-6.

⁴ FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas, *Public Notice*, DA 96-586 (rel. April 18, 1996).

⁵ 47 C.F.R. § 1.2110(g).

⁶ 47 C.F.R. § 1.2110(g).

As permitted by the Commission's rules, Morris could take up to two grace periods of one quarter each to satisfy any of its installment payments.⁷ To take advantage of the grace periods, Morris also had to pay applicable late fees.⁸ Consequently, the final deadline for making any outstanding payments on Morris's July 31, 2001 obligations was January 31, 2002.⁹ Any amounts relating to its July 31, 2001 obligations that remained outstanding after January 31, 2002 would trigger the automatic cancellation of the relevant license(s).¹⁰ Morris's payments prior to January 31, 2002 were insufficient to satisfy obligations arising from installment payments that originally came due on July 31, 2001. Morris did not make a subsequent payment until February 5, 2002, or more than six months after the original July 31, 2001 payment date.¹¹ By operation of the Commission's rules, because Morris failed to satisfy its July 31, 2001 obligations within two calendar quarters following the due date, the subject licenses automatically cancelled on February 1, 2002 pursuant to Section 1.2110(g)(4)(iv) of the Commission's rules.¹²

On February 5, 2002, Morris faxed a letter to the Commission's loan servicing agent representing that it had only just received the January bill.¹³ Thereafter, Morris filed its Waiver I Request on May 2, 2002, alleging, *inter alia*, that it had received its payment notice late and that it was confused over the amount of its obligation.¹⁴

Subsequent to its February 2002 attempt to bring itself current on the installment payments for the nine SMR licenses, Morris ceased making installment payments for seven of the nine licenses, it claims due to financial difficulties.¹⁵ Thus, after October 30, 2002 Morris ceased rendering installment payments for all but the KNNY352 and KNNY359 licenses. As further grounds for its requests for waiver, Morris states that it cannot obtain additional financing, that reasonably-priced and suitable 900 MHz SMR equipment remains unavailable,

⁷ 47 C.F.R. § 1.2110(g)(4)(i) and (ii).

⁸ 47 C.F.R. § 1.2110(g)(4)(i) and (ii).

⁹ 47 C.F.R. § 1.2110(g)(4)(ii).

¹⁰ 47 C.F.R. § 1.2110(g)(4)(iv).

¹¹ *See* Morris Waiver I Request at 2.

¹² *See* 47 C.F.R. § 1.2110(g)(4); Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 437 (1997).

¹³ *See* Letter to Judith Samuel, Colson Services Corporation, from W. Todd Hicks, Controller, Morris Communications, Inc. dated February 5, 2002.

¹⁴ *See* Morris Waiver I Request at 2-3. *See* 47 C.F.R. § 1.2110(g)(4).

¹⁵ *See* Morris Waiver II Request at 9, 13-15.

and that demand for 900 MHz in predominantly rural markets has not occurred.¹⁶ Morris therefore requests that the Commission waive Section 1.2110(g)(4) and Section 90.665(c) of the Commission's rules for all nine licenses.¹⁷

Discussion

To obtain a waiver of the Commission's rules, Morris must demonstrate: (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 the applicant has no reasonable alternative.¹⁸ We find that Morris has failed to satisfy this waiver standard.

Morris admits that its February 5, 2002 payment was made five days after the January 31, 2002 deadline, which in turn was more than six months after the original July 31, 2001 payment date.¹⁹ Morris asserts, among other things, that it was uncertain as to the exact amount owed and that it received its payment notice late.²⁰ Even assuming *arguendo* that Morris did not receive the Commission's January 2002 statement until after the January 31, 2002 deadline, the Commission has consistently held that bills are a courtesy and that each licensee is charged with the responsibility of knowing its installment payment obligations.²¹ The Commission has held unequivocally that "it is the responsibility of a licensee to ensure that installment payments are timely made and that it is not the duty of the Commission to inform a licensee that payments have been missed or that a license has been terminated."²² Morris was aware of the January 31, 2002 deadline and should have planned accordingly. It bore the risk of any complications or confusion that may have arisen.²³ Morris's asserted misunderstanding cannot, without more,

¹⁶ See Morris Waiver II Request at 7, 14.

¹⁷ See Morris Waiver II Request at 6.

¹⁸ 47 C.F.R. § 1.925.

¹⁹ See Morris Waiver I Request at 2.

²⁰ See Morris Waiver I Request at 2.

²¹ See Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113 (2000), *reconsideration denied*, Licenses of 21st Century Telesis Joint Venture, *Order on Reconsideration*, 16 FCC Rcd 17,257 (2001), *review denied in part, dismissed in part*, *21st Century Telesis Joint Venture v. F.C.C.*, 318 F3d 192 (D.C. Cir. 2003).

²² Lakeland PCS LLC and Cricket Licensee (Lakeland) Inc. for Assignment of PCS License for Station KNLG741, *Second Order on Reconsideration*, 15 FCC Rcd 23,733, ¶4 (2000) ("Lakeland").

²³ Morris asserts that there was delay in routing the payment notice to the appropriate contact person within the company since there was no contact name on the payment notice. As noted, the Commission provides payment notices to licensees as a courtesy. However, even when the Commission outsourced the administration of its auction

relieve it of its obligations under the Commission's rules. Allegations of mistake and circumstances similar to those raised by Morris would not distinguish it from prior cases in which we determined that denying relief was essential to safeguarding the integrity of the auctions process.²⁴ Morris's uncertainty as to the exact amount owed in connection with payments originally due July 31, 2001, is not sufficient to justify waiving the deadline. Its uncertainty could not -- and did not -- relieve it of the obligation to pay the properly assessed amounts and to continue making its quarterly payments. The Commission did not intend the two-quarter grace period to be used as a matter of course.²⁵ It is the responsibility of the licensee and not the Commission to ensure that accurate and timely payment of all financial obligations is made to the Commission.

Morris has failed to demonstrate that the underlying purpose of the Commission's payment rule would not be served, or would be frustrated, by its application in this particular case. Recognizing that small business licensees qualifying to pay winning bids for licenses over time may encounter financial difficulties over a lengthy payment period, Commission rules expressly permit such licensees to defer making required installment payments for up to two consecutive quarters after the relevant payment's original due date.²⁶ Requiring the payment of winning bids protects the integrity of the auction and the Commission's licensing process.²⁷ The Commission

loan portfolio to a new company, it provided notice to Morris and other licensees and emphasized that the loan remittance procedures would not change and that outsourcing would not change account numbers, debt obligations, or place of payment.

²⁴ See, e.g., Licenses of 21st Century Telesis, *supra*, 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 and Order*, 15 FCC Rcd 25103 (2000), further reconsideration denied, *Second Memorandum Opinion and Order*, 16 FCC Rcd 18,357 (2001); Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Memorandum Opinion and Order*, 14 FCC Rcd 6080 (1999), *aff'd*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1214855 (D.C. Cir., Nov. 24, 1999); Request of Inforum Communications, Inc. for Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment, *Order*, DA 04-20 (released January 8, 2004), *recon. pending*; Request of GLH Communications, Inc. for Temporary Waivers of Installment Payment Deadlines (47 C.F.R. § 1.2110(g)(4)) and Debt Collection Rules (47 C.F.R. §1901 et seq.), DA 03-2368, 18 FCC Rcd 14,695 (2003) (Petition for Reconsideration pending); Pan American Interactive, D.A. 03-2406, 18 FCC Rcd 15,314 (2003); 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).

²⁵ Indeed, the Commission has stated that it believes that licensees should be working to obtain the funds necessary to meet their payment obligations before they are due and accordingly, that grace periods should be used only in extraordinary circumstances. See Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, *Third Report and Order*, 13 FCC Rcd 374, 439 (1997).

²⁶ 47 C.F.R. § 1.2110(g)(4)(i) and (ii). Licensees that take advantage of these automatic grace periods must pay an additional late fee. If the full amount of the required installment payment is not received before its original due date but within the first quarter after it, the licensee must pay an additional five percent (5%) of the required installment payment. If the full amount of the required installment payment is received after the first but within the second quarter following its original due date, the licensee must pay an additional ten percent (10%) of the required installment payment.

²⁷ See Letter to Messrs. David Irwin and Nathaniel Hardy, counsel for MBO Wireless, Inc., from Margaret

assigns licenses using competitive bidding to promote the public interest objectives of Section 309(j) of the Communications Act.²⁸ Payment of winning bids in compliance with Commission rules is critical to realizing those public interest objectives. As the Commission has stated previously:

Section 309(j) specifically includes a presumption that licenses should be assigned by auction to those who place the highest value on the use of the spectrum. Such entities are presumed to be those best able to put the licenses to their most efficient use. The ability to make installment payments on a timely basis as a condition of retaining a license is intrinsic to the notion that licensees who cannot make timely payments should lose the presumption. Insisting that licensees demonstrate their ability to pay as a condition to continuing to hold licenses is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace.²⁹

When licensees fail to pay winning bids, or the principal and related interest when paying winning bids in installments, on a timely basis in compliance with the Commission's rules, the presumption that the auction assigned the license to the party that placed the highest value on the license is lost.³⁰ Such circumstances raise the prospect that the defaulting licensee outbid others simply by bidding regardless of (or without reasonable consideration for) its ability to pay. When a licensee fails to make its quarterly payment on time, the Commission has consistently declined to exercise much flexibility due to the dangers that such flexibility presents to the bedrock presumption that underlies the integrity of the auctions process as a spectrum assignment tool – *i.e.*, that those who value the spectrum the most, as demonstrated by *bona fide* high bids, are presumed to be those best able to put that spectrum to its most efficient use. If the Commission were to exercise much flexibility in relieving bidders from their bid obligations, then the bid would cease to operate as an effective proxy for identifying those who value the

Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 19 FCC Rcd 4011 (2004), citing Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113 (2000), *reconsideration denied*, Licenses of 21st Century Telesis Joint Venture, *Order on Reconsideration*, 16 FCC Rcd 17,257 (2001), *review denied in part, dismissed in part, 21st Century Telesis Joint Venture v. F.C.C.*, 318 F3d 192 (D.C. Cir. 2003).

²⁸ See 47 U.S.C. § 309(j)(3).

²⁹ Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,123-24 (2000), *reconsideration denied*, Licenses of 21st Century Telesis Joint Venture, *Order on Reconsideration*, 16 FCC Rcd 17,257 (2001), *review denied in part, dismissed in part, 21st Century Telesis Joint Venture v. F.C.C.*, 318 F3d 192 (D.C. Cir. 2003).

³⁰ *Id.*, 15 FCC Rcd at 25,123-24.

spectrum the most, thereby undermining the presumption that the high bidder is best able to put the spectrum to its most highly valued use. Accordingly, in such circumstances, the Commission consistently has denied waiver of automatic cancellation pursuant to Section 1.2110(g)(4)(iv).³¹ In order to avoid the automatic cancellation of its licenses, Morris's July 31, 2001 payment should have been made, at the latest, by January 31, 2002. It was not and Morris has failed to present any unique facts or circumstances to render the Commission's fundamental payment rules inequitable. We also find that Morris's reliance on the *Meredith S. Senter* and *Lakeland* decisions as support for its waiver request is misplaced.³²

Morris acknowledges that it is facing financial difficulties and that it cannot currently continue to make its installment payments for these licenses.³³ Morris claims that its inability to generate revenue from its licenses and "its substantial installment payment obligations for those licenses, have resulted in financial difficulties for Morris."³⁴ Morris maintains that "[d]ue to the

³¹ See, e.g., Licenses of 21st Century Telesis, *supra*, 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 and Order*, 15 FCC Rcd 25103 (2000), further reconsideration denied, *Second Memorandum Opinion and Order*, 16 FCC Rcd 18,357 (2001); Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Memorandum Opinion and Order*, 14 FCC Rcd 6080 (1999), *aff'd*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1214855 (D.C. Cir., Nov. 24, 1999); Request of Inforum Communications, Inc. for Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment, *Order*, DA 04-20 (released January 8, 2004) (reconsideration pending) (denying waiver to licensee that paid both required installment payment and applicable late fees days after non-payment triggered cancellation); Request of GLH Communications, Inc. for Temporary Waivers of Installment Payment Deadlines (47 C.F.R. § 1.2110(g)(4)) and Debt Collection Rules (47 C.F.R. §1901 et seq.), DA 03-2368, 18 FCC Rcd 14,695 (2003) (Petition for Reconsideration pending); Pan American Interactive, D.A. 03-2406, 18 FCC Rcd 15,314 (2003); 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). *Cf.* Letter to Messrs. David Irwin and Nathaniel Hardy, counsel for MBO Wireless, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 19 FCC Rcd 4011 (2004) (when licensee pays all amounts assessed as principal and interest prior to Commission final deadlines and pays any outstanding amounts assessed as late fees promptly after discovery of outstanding late fees after final payment deadline, Commission may waive final deadline for amounts assessed as late fees).

³² See Morris Waiver II Request at 8 and Letter to Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, from Frederick M. Joyce, Esq., Counsel to Morris Communications, Inc. dated November 24, 2004, citing Letter to Meredith S. Senter, Jr., Esq., from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 14 FCC Rcd 5003, ¶ 4 (1999) ("*Meredith S. Senter*"). In this 1999 decision, while the Auctions and Industry Analysis Division of the Wireless Telecommunications Bureau (the "Division") indicated that the repeated acceptance of a late payment *could* have been construed as a constructive waiver of the payment deadline, it also acknowledged that the licensee in that case had a record of timely payments over a period of nearly two years after it was in default. The Division also emphasized that it is every licensee's responsibility to ensure that its payments are submitted on time. In *Lakeland*, the Commission found that a constructive waiver was warranted where a payment notice had indicated that the final day of the grace period was one day after the actual due date. However, the facts surrounding Morris's missed payment deadline are very different. In looking at the totality of the circumstances, there were no administrative actions by the Commission that could have been construed as a constructive waiver.

³³ See Morris Waiver II Request at 14.

³⁴ See Morris Waiver II Request at 14.

economic downturn, Morris has had reduced financial resources which have been exacerbated by its installment payments on its 900 MHz SMR licenses which have not yet generated any revenue for Morris.”³⁵ In fact, in light of its financial difficulties, Morris has failed to make any payments for seven of the nine licenses since October 30, 2002,³⁶ and has requested that the Commission grant it relief from making installment payments for all of its licenses for a period of one year to enable it to utilize those funds to build its 900 MHz network.³⁷

Morris attempts to rely on Commission precedent for the proposition that the 900 MHz SMR service is a capital intensive service and as such, it should be relieved of its installment payment obligations for the seven licenses on which it has ceased making payments.³⁸ Morris’s characterization that the Commission conceded that implementation of the 900 MHz SMR service is a capital intensive service in *Amendment of Parts 2 and 90 of the Commission’s Rules* misconstrues the totality of the Commission’s findings in that Order. In discussing what measures may be appropriate to encourage the participation of designated entities pursuant to Section 309(j) of the Communications Act, the Commission stated that its “expectation is that while the 900 MHz MTA service may be a capital-intensive undertaking, it should require considerably less capital than broadband or regional narrowband PCS, thereby providing greater opportunities for participation by smaller businesses”³⁹ The Commission also stated that “we believe that the 900 MHz SMR service may be a suitable service in which to assess the effectiveness of more uniform measures, because capital entry requirements are expected to be lower than PCS and the spectrum is occupied by incumbents who will not be required to relocate.”⁴⁰ Consequently, we believe that Morris’s reliance on this Order is misplaced. Additionally, the Commission has previously declined to waive payment deadlines where a licensee has asserted financial difficulties or cost intensive equipment complications.⁴¹

³⁵ See Morris Waiver II Request at 14.

³⁶ See Letter to Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, from Frederick M. Joyce, Esq., counsel for Morris Communications, Inc. dated November 24, 2004 (acknowledging that since the filing of its Waiver II Request on January 21, 2003, Morris only continued to make payments on two of its licenses, KNNY352 and KNNY359).

³⁷ See Morris Waiver II Request at 6. As a result of the action we take in this Order, we will not grant Morris’s one year forbearance request to avoid making installment payments on all of its licenses.

³⁸ See Morris Waiver II Request at 14, citing Amendment of Parts 2 and 90 of the Commission’s Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2702 ¶156 (1995) (“*Amendment of Parts 2 and 90 of the Commission’s Rules*”).

³⁹ *Id.* at 11 FCC Rcd 2639, 2702 ¶156.

⁴⁰ *Id.*

⁴¹ Pan American Interactive, D.A. 03-2406, 18 FCC Rcd 15,314 (2003); 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).

Conclusion

For the foregoing reasons, Morris is not entitled to a waiver of Section 1.2110(g)(4) of the Commission's rules with respect to the January 31, 2002 payment deadline. Accordingly, pursuant to Section 1.2110(g)(4),⁴² Morris's licenses⁴³ have cancelled and Morris is subject to debt collection procedures. We therefore DENY its Request for Waiver and its Petition for Rule Waiver. We further DISMISS Morris's Request for Stay as moot. Considering our findings above, we will not grant Morris relief from Section 90.665(c) of the Commission's rules so that it may have additional time to construct a 900 MHz system.

This action is taken pursuant to Section 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.⁴⁴

Sincerely,

Margaret Wiener
Chief, Auctions and Spectrum Access Division
Wireless Telecommunications Bureau

⁴² 47 C.F.R. § 1.2110(g)(4).

⁴³ KNNY352 - MTA006, Channel Block O; KNNY353 - MTA044, Channel Block R; KNNY355 - MTA029, Channel Block A; KNNY356 - MTA043, Channel Block Q; KNNY357 - MTA044, Channel Block H; KNNY358 - MTA043, Channel Block C; KNNY359 - MTA006, Channel Block A; KNNY361 - MTA044, Channel Block M; and KNNY363 - MTA044, Channel Block N.

⁴⁴ 47 C.F.R. § 0.331.