

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

In the Matter of Application of)	
)	
COMMUNICATION VENTURES, INC.,)	File No. 20000728AAE
Assignor and)	
)	
WINBEAM, INC., Assignee)	
)	
To Assign Broadband Radio Service Licenses)	
B117 (Dubois-Clearfield, PA), B203 (Indiana,)	
PA), and B328 (Oil City-Franklin, PA))	

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 2005

Released: November 3, 2005

By the Chief, Auctions & Spectrum Access Division, and Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us an application filed by Communication Ventures, Inc. (“CVI”) and WinBeam, Inc. (“WinBeam”) (collectively, the “Applicants”) seeking Commission consent to assign three Broadband Radio Service (“BRS”) licenses (the “Assignment Application”).¹ The Assignment Application also includes a request by CVI for waiver of Section 1.2111 of the Commission’s Rules² to the extent necessary to allow for consummation of the assignment of licenses from CVI to WinBeam.³ For the reasons stated below, we grant the Waiver Request and the Assignment Application.

II. BACKGROUND

2. In 1996, CVI was the high bidder on the BRS authorizations for the following Basic Trading Areas (“BTAs”): DuBois-Clearfield, PA (BTA117), Indiana, PA (BTA203), and Oil City-Franklin, PA (BTA328) (collectively, the “Licenses”). CVI was issued authorizations to operate stations within these BTAs on August 16, 1996.⁴ As a small business, CVI was eligible to participate in the

¹ File No. 20000728AAE (“Assignment Application”). On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing the Multipoint Distribution Service (“MDS”) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004). To better reflect the forward-looking vision for these services, the Commission renamed MDS as BRS. Because the new rules are now in effect, we will refer to the service by its new name.

² 47 C.F.R. § 1.2111 (requirements for unjust enrichment payments for assignment or transfer of control of licenses subject to installment payments).

³ Letter from Russell H. Ritchie, President, Communications Ventures, Inc. to Wireless Telecommunications Bureau (filed Sep. 26, 2005) (“Waiver Request”).

⁴ Call Signs KNSC335, KNSC337, KNSC338.

Commission's installment payment plan for BRS licenses.⁵ The Commission granted the Licenses to CVI on the condition that CVI would timely meet its payment obligations under the installment payment program.⁶ In 1998, CVI timely filed a grace period request regarding its installment payments for the Licenses.⁷ Subsequently, CVI also filed a Contingent Petition for Reconsideration or Reinstatement in the event that the Commission found that its BRS authorizations had automatically cancelled for failure to make timely installment payments.⁸ On February 3, 1999, CVI initiated Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court for the District of Arizona ("Bankruptcy Court").⁹ These bankruptcy proceedings remain pending.¹⁰

3. According to the Assignment Application, WinBeam was formed "for the purpose of providing enhanced data transmission and communication services throughout portions of New York, Pennsylvania, Maryland, and Virginia."¹¹ WinBeam asserts that it is currently developing a wireless broadband system that will bring advanced communication services and data transmission to these markets.¹²

4. On May 17, 2000, CVI and WinBeam entered into an Asset Purchase Agreement, in which CVI is to assign its rights and interests in the Licenses to WinBeam, subject to all appropriate Commission and Bankruptcy Court approvals. In consideration for the assignment of the Licenses, WinBeam is to pay the Commission an amount sufficient to satisfy the Commission's secured claims against the Licenses, which total \$159,784.64 ("FCC Claim").¹³ On July 6, 2000, the Bankruptcy Court approved the sale of assets, including the assignment of the Licenses, subject to Commission approval, from CVI to WinBeam ("Bankruptcy Approval Order").¹⁴

⁵ See 47 C.F.R. § 21.960(c) (1996). In 1997, the Commission determined that installment payments will not be used in the immediate future as a means of financing small business participation in its auction program. See Amendment of Part 1 of the Commission's Rules – Competitive Bidding, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 397 ¶ 38 (1997).

⁶ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2391 ¶ 240 (1994) (*Competitive Bidding Second Report and Order*). See also 47 C.F.R. § 21.960(b)(4) (1996) ("A BTA authorization issued to an eligible winning bidder that elects installment payments shall be conditioned upon the full and timely performance of the BTA authorization holder's payment obligations under the installment plan.")

⁷ CVI filed a timely "grace period" request on February 27, 1998, in accordance with the Commission's installment financing rules in effect at that time. See 47 C.F.R. § 1.2110(e)(4)(ii)-(iii) (1997). CVI also filed additional requests on May 29, 1998, August 31, 1998, November 28, 1998, and March 5, 1999.

⁸ See Contingent Petition for Reconsideration or Reinstatement, filed by CVI on October 27, 1998, and supplemented on November 30, 1998, December 29, 1998, and March 5, 1999 (collectively, "Contingent Petitions for Reconsideration").

⁹ CVI is a debtor and debtor-in-possession under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. Section 101 *et seq.*, as amended (the "Bankruptcy Code"). See *In re Communications Ventures, Inc.*, Case No. 99-01158-ECF-RTB (Bankr. Ct. for the Dist. of Ariz. 1999).

¹⁰ Subsequent to the filing of bankruptcy, the Commission approved a pro forma, involuntary transfer of control of Communications Ventures, Inc. to Communications Ventures, Inc., Debtor-in-Possession. See File No. BTCMD-990408VW.

¹¹ See Assignment Application, Exhibit B.

¹² See Assignment Application, Exhibit G.

¹³ *Id.*

¹⁴ See Assignment Application, Exhibit A.

5. On July 28, 2000, CVI and WinBeam filed the Assignment Application seeking Commission consent to the assignment of the Licenses.¹⁵ The Assignment Application was amended on September 26, 2005, to include a request for waiver of Section 1.2111(c), which requires, in relevant part, the licensee to make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment of licenses financed under the installment payment option.¹⁶ CVI requests that the rule be waived insofar as it requires payment of interest from the date of its bankruptcy filing, and asks that the assignments be approved, conditioned only on payment of the FCC Claim, as reflected in the Bankruptcy Approval Order.¹⁷

6. On October 3, 2005, the Department of Justice, acting on behalf of the Commission, and CVI executed a letter agreement (the "Agreement") resolving certain issues pertaining to the Licenses, including the compromise of the installment payment obligations incurred by CVI with respect to the Licenses.¹⁸ Specifically, pursuant to the Agreement, all claims between the Commission and CVI with regard to the Licenses will be satisfied upon the Commission's receipt of payment in the amount of the FCC Claim and the Commission's regulatory approval of the assignment of the Licenses.¹⁹ The FCC Claim consists of the amount of CVI's outstanding installment debt, including interest, for the Licenses, but does not include any interest on the debt from the date of CVI's bankruptcy filing. The Agreement also states that CVI will release any claims that "CVI might have regarding the processing of either its assignment applications or requests for regulatory rule waivers" with respect to the Licenses.²⁰

III. DISCUSSION

A. Request for Waiver

7. Section 1.2111(c) of the Commission's Rules governs the assignment of BRS licenses financed under the Commission's installment payment program.²¹ Pursuant to that rule, CVI is required to pay the full amount of the remaining debt, the accrued interest, and any late fees, prior to assignment of its licenses.²² We first note that the FCC Claim is sufficient to fully satisfy CVI's outstanding principal for the three licenses CVI proposes in the Assignment Application to assign to WinBeam. We also note that CVI filed a timely grace period request prior to the Commission amending the rules governing late installment payments, and therefore, is not subject to any late fees associated with the installment payments for the Licenses.²³ In the instant matter, the proposed payment of the FCC Claim does not

¹⁵ The former Mass Media Bureau placed the Assignment Application on public notice on January 19, 2001. "Mass Media Bureau Multipoint Distribution Service Applications Accepted for Filing," *Public Notice*, Report No. 161 (rel. Jan. 19, 2001). No oppositions or other comments were filed in response to the public notice.

¹⁶ 47 C.F.R. § 1.2111(c). *See* Waiver Request.

¹⁷ *See* Waiver Request.

¹⁸ Letter from Seth Brandon Shapiro, Department of Justice, to Victoria M. Stevens, Esq., counsel for CVI.

¹⁹ *Id.* at 1. Specifically, the Agreement provides that, upon receipt of payment(s) equal to the FCC Claim, the Commission and CVI will have "resolved, released and forever discharged all claims they might otherwise have against each other regarding the [Licenses]" which "include, without limitation, the compromise of all debt, if any, owed by CVI to the FCC with respect to the [Licenses] in excess of the [FCC Claim]." *Id.*

²⁰ *Id.* The parties specifically agreed that, "in conjunction with the approval of assignment of these licenses, the FCC will treat [the pending regulatory waiver requests that concern payment obligations] as withdrawn with respect to the [Licenses]." *Id.* at n.2.

²¹ 47 C.F.R. § 1.2111. Section 1.948 governs the assignment of BRS licenses generally. 47 C.F.R. § 1.948.

²² 47 C.F.R. § 1.2111.

²³ CVI filed its initial grace period request before the Commission amended its rules to allow for automatic grace periods to make late payments so long as the licensee also submitted a late fee. *See* Wireless Telecommunications

(continued...)

include any interest accrued after CVI filed for bankruptcy, and therefore is insufficient to pay all of the interest required by the Commission's rules. Thus, if we are to approve the assignment of licenses to WinBeam as proposed in the Assignment Application, we must grant CVI a limited waiver of the full payment provision in Section 1.2111 of the Commission's Rules with respect to a portion of interest that would have accrued under the rule.

8. To obtain a waiver, a party must show either that: (i) the underlying purpose of the applicable rule would not be served, or would be frustrated by its application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) 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 the applicant has no reasonable alternative.²⁴ Pursuant to our unjust enrichment rules, and as explained above, a transaction that does not satisfy the full amount of the debt owed to the Commission requires a rule waiver. In the instant matter, a grant of a limited waiver ensures that the licenses are not subject to the continued uncertainties inherent in the bankruptcy process. Specifically, we find that the unique facts and circumstances of the CVI bankruptcy proceeding and the Agreement render a strict application of the installment payment unjust enrichment rules to the present circumstances to be contrary to the public interest. Moreover, we find that grant of a limited waiver will allow this spectrum to be put into immediate use for the benefit of consumers and that the approval of the proposed transaction, as described herein, serves the public interest.

9. Additionally, we believe that granting a limited waiver of Section 1.2111(c) of the Commission's Rules to CVI is consistent with the Commission's statutory obligations under Section 309(j) of the Communications Act²⁵ and Commission precedent. The proposed transaction will promote the efficient use of spectrum and the rapid deployment of services for the benefit of the public. Such an outcome is consistent with the Commission's statutory obligation in Section 309(j)(3)(A)-(B) to promote competition and to speed the deployment of services for the benefit of the public.²⁶ We are also mindful that the recovery of \$159,784.64 to the benefit of the U.S. Treasury is consistent with the intent of Section 309(j)(3)(C) of the Act, "to recover for the public a portion of the value of the public spectrum resource."²⁷ We conclude that in this case, continued litigation will only hinder the Commission's ability to recover such value.²⁸ The proposed assignment of licenses from CVI to WinBeam is an important step in ending the uncertainty surrounding the licenses as a result of the CVI bankruptcy proceedings. We

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Bureau Provides Guidance on Grace Period and Installment Payment Rules, *Public Notice*, 13 FCC Rcd 18213, 18215 (1998) ("Furthermore, the late payment and automatic cancellation provisions of amended Section 1.2110 will not apply to licenses with properly filed grace period requests until such time as the [Wireless Telecommunications] Bureau addresses these grace period requests."). In so far as CVI received the benefit of filing the initial grace period request, we find its need for additional time to be moot. Moreover, CVI's additional grace period requests are treated as withdrawn pursuant to the Agreement. See Agreement at n.2.

²⁴ 47 C.F.R. § 1.925; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *Thomas Radio Co. v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027(1972).

²⁵ 47 U.S.C. § 309(j).

²⁶ 47 U.S.C. § 309(j)(3)(A)-(B).

²⁷ 47 U.S.C. § 309(j)(3)(C).

²⁸ See, e.g., Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC, WT Docket 03-217, *Memorandum Opinion and Order*, 19 FCC Rcd 2570, 2589-90 ¶ 45 (2004) ("*NextWave-Cingular Order*").

therefore believe that under these unique circumstances, granting a waiver is entirely consistent with the Commission's statutory obligations in Section 309(j)(3)(C) of the Communications Act.²⁹

10. Additionally, we do not believe that approval of the proposed transaction and grant of a limited waiver results in any unjust enrichment as contemplated by the Commission's rules. The approval of the proposed transaction is not the type of "rapid sale of licenses acquired through the benefit of preference policies" that the Commission's anti-trafficking rules were designed to prevent.³⁰ While we recognize that the acceptance of the FCC Claim results in less than full payment under the Commission's rules and would be impermissible under other circumstances, on balance, we conclude that the present circumstances are similar to those the Commission considered in the *NextWave-Cingular Order*, finding in favor of the grant of a limited waiver.³¹

11. In granting this limited waiver, we follow the precedent set by the Commission in the *NextWave-Cingular Order*, and do not reach any determination regarding how long or how much interest has accrued under Section 1.2111 of the Commission's Rules.³² Instead, because the Department of Justice executed the Agreement, on the Commission's behalf, and has exercised its discretion under the Debt Collection Improvement Act of 1996³³ to grant debt forgiveness for any monies owed above the FCC Claim (subject to the Commission's necessary regulatory approvals that we are providing herein), we need not define the specific amount of the interest owed for the licenses in order to determine that the public interest will be served by a grant of a limited waiver of the full payment provision of Section 1.2111 regarding those obligations. The monies remaining of the FCC Claim (after fully satisfying CVI's obligation under Section 1.2111 for the outstanding principal of the three BTA licenses) satisfy at least a portion of the interest owed by CVI under Section 1.2111. The grant of a limited waiver of CVI's obligation to render the full payment owed under Section 1.2111 allows the transaction described in the Agreement to be consummated as the parties intended. This in turn allows for resolution of longstanding litigation with respect to the licenses included in the proposed assignment. As the Commission noted in the *NextWave-Cingular Order*, such action has significant benefits to the public.³⁴

B. Public Interest Determination

12. We also conclude that a grant of the Assignment Application would be in the public interest. The qualifications of the assignor have not been challenged, and we see no reason to reevaluate the qualifications of CVI in this proceeding. Similarly, WinBeam currently holds BRS authorizations, and no issues have been raised with respect to the basic qualifications of WinBeam, as assignee. Thus, we find no reason to examine the qualifications of WinBeam at this time. Based upon the record before us, there is no reason to conclude that a grant of this Assignment Application would raise any competitive concerns.

13. Moreover, the Applicants have stated that assignment of the Licenses to WinBeam will facilitate the development of advanced wireless services in portions of New York, Pennsylvania, Maryland, and Virginia.³⁵ Additionally, the proposed transaction will increase the amount of spectrum

²⁹ 47 U.S.C. § 309(j)(3)(C).

³⁰ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-235, *Second Report and Order*, 9 FCC Rcd 2348, 2394 ¶ 258 (1994).

³¹ See *NextWave-Cingular Order*, 19 FCC Rcd at 2590 ¶ 46.

³² See *id.* at 2590 ¶ 47.

³³ Debt Collection Improvement Act of 1996, Public Law 104-134, 110 Stat. 1321, 1358 (Apr. 26, 1996).

³⁴ See *NextWave-Cingular Order* at 2590 ¶ 47.

³⁵ See Assignment Application, Exhibit G.

being used to provide wireless services to consumers. Finally, the proposed assignment will facilitate the successful resolution of CVI's bankruptcy proceedings.³⁶ Based on these factors, we conclude that the proposed assignment of the Licenses from CVI to WinBeam will serve the public interest, convenience, and necessity, and, therefore, meets the requirements of Section 310(d) of the Communications Act.

IV. CONCLUSION

14. We grant CVI a waiver of the full payment provision of Section 1.2111 of the Commission's rules, as described herein. In addition, pursuant to our review under Section 310(d) of the Communications Act, we find that grant of the Assignment Application will serve the public interest, convenience, and necessity.³⁷

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.925 and 1.2111 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.2111 of the Commission's Rules, 47 C.F.R. § 1.925, 1.2111, that the Waiver Request filed by Communication Ventures, Inc. on September 26, 2005 IS GRANTED.

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.948 of the Commission's Rules, 47 C.F.R. § 1.948, that the application to assign Broadband Radio Service authorizations B117, B203 and B328 from Communication Ventures, Inc. to WinBeam, Inc. (File No. 20000728AAE) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Margaret W. Wiener
Chief, Auctions & Spectrum Access Division
Wireless Telecommunications Bureau

Joel D. Taubenblatt
Chief, Broadband Division
Wireless Telecommunications Bureau

³⁶ *Id.*

³⁷ 47 U.S.C. § 310(d).